TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

LIBRARY
SUPREME COURT, U.S.

No. 33

LOUIS K. NATHANSON, TRUSTEE, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 27, 1952
CERTIORARI GRANTED JUNE 2, 1952

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1951.

LOUIS K. NATHANSON, TRUSTEE,

RESPONDENT, APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER, APPELLEE.

In the Matter of

MacKENZIE COACH LINES, INC., Bankrupt.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
FROM ORDER (WYZANSKI, J.), SEPTEMBER 28, 1951.

RECORD ON APPEAL.

TABLE OF CONTENTS.

	Page
Court (Court of Appeals) and Title of Case	1
Record on Appeal from District Court:	
Title of Case in District Court (Massachusetts)	1
Amended Proof of Claim of National Labor Relations Board	2
Decision and Order of National Labor Relations Board	5
Appendix A	8
Decree of United States Court of Appeals	10
Letter from Regional Director	11
Back Pay Computation	13
Proceedings in District Court	14
Testimony of Gerald Robinson	20
Sam G. Zack	49
Joseph Lepie	66
Thomas H. Ramsey	92
Exhibit No. 1, Received in Evidence	30
Board's Request for Findings of Fact and Conclusions of Law	112
Referee's Order Disallowing Amended Proof of Claim	121
Board's Petition for Review of Referee's Order	122
Exhibit A	123
Certificate by Referee to Judge	124
Copy of Affidavit of Compliance	129
Supplement to Petition of National Labor Relations Board for Review of Referee's Order	131
Order of United States District Court	135
Opinion of United States District Court	136
Notice of Appeal by Trustee in Bankruptcy	140
Stipulation	140
Statement of Points	141
Appellant's Designation of Contents of Record	142
Appellee's Amended Designation of Contents of Record	142
Certificate of Clerk of United States District Court	144

	Page
Proceedings in U.S.C.A. for the First Circuit	145
Opinion, Hartigan, J.	145
Judgment	151
Clerk's certificate (omitted in printing)	151
Order allowing certiorari	152

United States Court of Appeals for the First Circuit.

OCTOBER TERM, 1951.

LOUIS K. NATHANSON, TRUSTEE,

RESPONDENT, APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER, APPELLEE.

IN THE MATTER OF

MacKENZIE COACH LINES, INC., BANKRUPT.

RECORD ON APPEAL.

In Bankruptcy No. 70284.

IN THE MATTER OF

MacKENZIE COACH LINES, INC., BANKRUPT.

AMENDED PROOF OF CLAIM.

[Filed April 17, 1950.]

STATE OF MASSACHUSETTS }
COUNTY OF SUFFOLK } ss

Bernard L. Alpert, being duly sworn, deposes and says:

1. That he is Regional Director of the National Labor Relations Board, hereinafter termed the Board, for the First Region, having an office at No. 24 School Street, Boston, Massachusetts and is duly authorized by the Board to make this proof of claim in its behalf.

2. That the Board is an agency of the Federal Government existing under and by virtue of the National Labor Relations Act as amended, (61 Stat. 136, 29 U.S.C.A. Secs. 141 *et seq.* (Supp., July 1947), a copy of which is attached hereto.

3. That MacKenzie Coach Lines, the above-named bankrupt, was at and before the filing against it of the petition for adjudication of bankruptcy, and still is, justly and truly indebted to the Board in upwards of the sum of $4463.69 in the manner more fully described in Paragraph 4.

4. That the said liability and the consideration therefor is as follows:

On February 4, 1948, in a proceeding entitled "In the Matter of Hill Transportation Company and MacKenzie Coach Lines, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 683 (A. F. L.)", Case No. 1-C-2823, and in which the complaint alleged that the bankrupt and Hill Transportation Company had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) (3) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, the Board, pursuant to Section 10 (c) of the Act, as amended, rendered a Decision and Order in which

is found that the debtor and Hill Transportation Company had engaged in unfair labor practices as alleged in the complaint, which included the discharge by the bankrupt and Hill Transportation Company of certain employees, namely, Elwyn Bartlett, Harold Bartlett, Alkernon Nichols, Robert Varney, C. R. Bunn, and Gerry Kimball, for the reason that they had joined and assisted a certain labor organization and engaged in concerted activities for mutual aid and protection, thereby discriminating as to their hire and tenure of employment for the purpose of discouraging membership in said organization, and interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act. The affirmative action directed by the Board included a requirement that the bankrupt and Hill Transportation Company reinstate all said employees except Gerry Kimball to their former positions and make whole all said employees, including Kimball, for any loss of pay suffered by them as the result of such discrimination by paying to each of them a sum of money equal to that which he normally would have earned as wages during the period from the date of discrimination to the date of offer of reinstatement less his net earnings during that period. A certified copy of the Board's Order, upon which this claim is founded, is attached hereto.

5. That the bankrupt, having reinstated said employees, has not complied with the Board's Order in so far as it directed the debtor to make whole said employees, except Elwyn Bartlett, and no part of the obligation of the bankrupt to make payment of back pay as aforesaid to the remaining employees hereinabove named has been fulfilled nor has any part of said back pay payable to said remaining employees been paid as directed, except as hereinafter set forth.

6. That there are no set-offs or counterclaims to said obligation.

7. That the National Labor Relations Board does not hold nor does deponent or any other person, to deponent's knowledge, hold for the use of the Board any securities for said obligation.

8. That on December 7, 1948 the United States Court of Appeals for the First Circuit entered a Decree enforcing the Order of the Board, a copy of said Decree of the United States Court of Appeals for the First Circuit is attached hereto.

9. That attached hereto is a statement showing the amount of back pay due, itemized according to the respective employees involved.

10. That said obligation is entitled to priority as a wage claim to the extent that back pay not exceeding the sum of $600.00 accrued to each employee during the period of three months before commencement of this proceeding, and the remainder of said obligation is entitled to priority as a debt owing to the United States.

BERNARD L. ALPERT
Regional Director
National Labor Relations Board
First Region

Subscribed and sworn to before me this 14th day of April, 1950

LEO J. HALLORAN,
Notary Public.

[Seal]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of HILL TRANSPORTATION COMPANY and MACKENZIE COACH LINES, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 633 (A.F.L.)	Case No. 1-C-2823

Mr. Robert E. Greene, for the Board.
Hughes and Burns, by *Mr. Walter R. Calderwood,* of Dover, N. H., for the respondents.
Messrs. Basil D. French and *Harry Parr,* of Manchester, N. H., for the Union.

Decision and Order.

[February 4, 1948.]

On April 14, 1947, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. No exceptions to the Intermediate Report were thereafter filed with the Board.

The Board has considered the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. In view of the fact that no exceptions have been filed and upon the entire record in the case, the Board hereby adopts the find-

ings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the respondents, Hill Transportation Company and MacKenzie Coach Lines, Inc., and their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers, Local No. 633 (A.F.L.), or in any other labor organization of their employees, by discriminatorily discharging or refusing to reinstate any of their employees or in any other manner discriminating with regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 633 (A.F.L.), as the exclusive representative of all the respondents' maintenance and repair shop employees employed at the Hampton garage, excluding clerical employees and supervisors;

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 633 (A.F.L.), or any other labor organization, to bargain collectively

[1] Those provisions of Section 8 (1) (3), and (5) of the National Labor Relations Act, which the Trial Examiner herein found were violated, are continued in Section 8 (a) (1), (a) (3), and (a) (5) of the Act as amended by the Labor Management Relations Act, 1947.

through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the amended Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Elwyn Bartlett, Harold Bartlett, Alkernon Nichols, Robert Varney and C. R. Bunn immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges in the manner set forth in the Intermediate Report in the section entitled "The remedy";

(b) Make whole in the manner set forth in "The remedy" the persons whose names appear in Appendix A of this Order for any loss they may have suffered by reason of the respondents' discrimination against them;

(c) Upon request, bargain collectively with International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers, Local No. 633 (A.F.L.), as the exclusive representative of all their employees in the aforesaid appropriate unit with respect to grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(d) Post immediately at their garage and repair shop at Hampton, New Hampshire, copies of the notice attached hereto and marked Appendix A.[2] Copies of said notice to be furnished by the Regional Director for the First Region, shall, after being duly signed by the respondents' representative, be posted by the respondents immediately upon receipt thereof and maintained by them for sixty (60)

[2] In the event that this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted before the words, "A DECISION AND ORDER" the words "A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING."

consecutive days thereafter, in conspicuous places in their place of business, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the First Region (Boston, Massachusetts) in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

Signed at Washington, D. C., this 4th day of February 1948.

PAUL M. HERZOG
Chairman

JOHN M. HOUSTON
Member

JAMES J. REYNOLDS, JR.
Member

ABE MURDOCK
Member

J. COPELAND GRAY
Member

(Seal) National Labor Relations Board

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization to form labor organizations, to

join or assist INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL No. 633 (A.F.L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed and place those for whom no employment is immediately available upon a preferential list, and make them whole for any loss of pay suffered as a result of the discrimination.

Elwyn Bartlett — Harold Bartlett
Alkernon Nichols — C. R. Bunn
Robert Varney

WE WILL MAKE WHOLE the following named employee for any loss of pay suffered as a result of our discrimination against him.

Gerry Kimball

WE WILL bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all maintenance and repair shop employees at the Hampton garage, excluding clerical employees and supervisors.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or ten-

ure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

HILL TRANSPORTATION COMPANY
MACKENZIE COACH LINES, INC.
(Employers)

Dated: ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[CLERK'S MEMORANDUM: The foregoing copy of the Decision and Order was certified by the Executive Secretary of the National Labor Relations Board April 13, 1950.

JOHN A. CANAVAN, *Clerk.*]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

October Term, 1948

No. 4395,

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HILL TRANSPORTATION COMPANY and
MACKENZIE COACH LINES, INC.,
Respondents.

Decree.

December 7, 1948.

This cause came on to be heard December 7, 1948, after notice, upon the petition for enforcement of an order of the

National Labor Relations Board, transcript of record, and motion for the summary entry of decree, and was argued by counsel for the petitioner and by counsel appearing specially for Louis K. Nathanson, Trustee in Bankruptcy of MacKenzie Coach Lines, Inc.

Upon consideration whereof, It is now, to wit, December 7, 1948, here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of February 4, 1948, with the exception of paragraph 2(e), is hereby affirmed and enforced.

It is further ordered that the respondents herein each notify the regional director of the first region in writing within fifteen (15) days from the date of this decree what steps it has taken to comply with said order.

By the Court:

/s/ ROGER A. STINCHFIELD

(Seal) Clerk.

A true copy.

Attest: /s/ ROGER A. STINCHFIELD

Clerk.

NATIONAL LABOR RELATIONS BOARD

FIRST REGION

24 School Street

Boston 8, Massachusetts

April 21, 1950

Hon. Wilfred H. Smart
Referee in Bankruptcy
Room 1128, Federal Building
Boston, Massachusetts

Re: *MacKenzie Coach Lines, No. 70,284*

Dear Mr. Smart:

A recheck of the Amended Proof of Claim, dated April 14, 1950, revealed some typographical errors in the figures

of the Back Pay Computation attached thereto. I therefore had the Computation retyped and enclose a copy thereof. You will notice that the errors did not relate to the sum total of the back pay liability which remains unchanged.

Sincerely yours,

BERNARD L. ALPERT
Regional Director

Encl: (1)

cc: Henry Friedman, Esquire
10 State Street
Boston, Massachusetts

Owsley Vose, Esquire
National Labor Relations Board
Washington 25, D. C.

Back Pay Computation

Name	Average Weekly Wage*	Weeks in Back Pay Period	Gross Wage Loss	Net Interim Earnings	Net Back Pay	Previously Paid on Account	Balance Now Due
Bartlett, Harold J.	68.996	60	4139.76	2409.08	1730.68	153.50	1572.18
Bunn, Clifford R.	47.619	29	1380.95	Not yet located, hence unable to compute			
Kimball, Gerry S.	52.328	25	1308.20	862.74	445.46	125.20	320.26
Nichols, Alkernon F.	52.289	69	3607.94	2161.91	1446.03	80.67	1365.36
Varney, Robert	54.555	68	3709.74	2368.22	1341.52	135.63	1205.89
			14146.59	7801.95	4963.69	500.00	4463.69

* Computed upon the basis of 20 week's wages preceding the unfair labor practices except in the case of C. R. Bunn, who was employed 7 weeks prior to the unfair labor practices.

UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS.

In the Matter of: HILL TRANSPORTATION COMPANY and MACKENZIE COACH LINES, INC.	Bankruptcy No. 70,284.

Room 1128, Federal Building,
Boston, Massachusetts,
Monday, April 17, 1950.

PROCEEDINGS

REFEREE SMART: The hearing will be in order.

MR. NATHANSON: Your Honor, may I ask this question, so we will know from where we proceed.

Is it understood that the evidence that is already in, is in, and we are going from there on?

REFEREE SMART: That is right.

MR. NATHANSON: Very well, sir.

MR. VOSE: Your Honor, I have here an Amended Proof of Claim which incorporates the figures which Mr. Jaworski has been working on from the books of the bankrupt transportation company for the past two weeks, and it is substantially the same claim. As the result of his investigation, the total amount is reduced about 20 per cent, and I respectfully ask leave to file it.

REFEREE SMART: If you have a different proof of claim, I suppose the evidence would start all over.

MR. VOSE: As I understand it, there hasn't been any evidence adduced one way or another, aside from the original proof of claim filed in this proceeding.

MR. NATHANSON: That isn't so.

REFEREE SMART: Have you proof of filing priority?

MR. VOSE: Yes, your Honor.

REFEREE SMART: Is it a priority wage claim?

MR. VOSE: As we are seeking primarily governmental priority.

REFEREE SMART: I don't know what you mean. There is a priority wage claim in Bankruptcy Case—

MR. VOSE: Under 64(a)(2) in so far as that is applicable; also priority under 64(a)(5) which is accorded debts due the United States. That is our position in this matter.

MR. NATHANSON: Your Honor, just in the interest of saving time so that we won't have these hearings and briefs go on indefinitely, I am willing to go on, on this Amended Proof. But I let it be clearly understood that the facts set forth and the itemized statements set forth are not admitted by us to be true, as we have continually told the representative of the Board.

May I just at this time summarize briefly the evidence that came in beforehand, so that it will be part of this record, since I notice that the representative of the Union is not here.

It was testified to before you at the first hearing, by the representative—I think the president of the Union—that after the order was entered into there was a conference between the president of the Union—

REFEREE SMART: To what order are you referring? You say "the order".

MR. NATHANSON: The order of the National Labor Relations Board.

REFEREE SMART: So state it then.

MR. NATHANSON: Thank you, your Honor.

That after the order of the National Labor Relations Board was filed, Mr. French, the president of the Union,

Mr. Shanahan, representing the officers of the Hill Company, and Mr. Robinson, the treasurer of the Hill Company, and Mr. Lepie, counsel for the National Labor Relations Board, had a conference,—

REFEREE SMART: Did you include anybody from MacKenzie Coach Lines?

MR. NATHANSON: No, sir.

REFEREE SMART: MacKenzie wasn't represented?

NATHANSON: Wasn't represented; but the claim is against both.

—had a conference in which certain demands were made of what the back pay should be.

REFEREE SMART: Made by whom?

MR. NATHANSON: By the employees. Now the employees set forth in this computation, in this Proof of Claim: Harold J. Bartlett, Gerry S. Kimball, A. F. Nichols, and Robert Varney, made claims aggregating about $800.00.

REFEREE SMART: That is the employees themselves.

MR. NATHANSON: The employees themselves. They never made a claim for any larger amount than that, these four. They made claims aggregating $800.00. The amount was disputed.

REFEREE SMART: By whom?

MR. NATHANSON: By the Hill Company, by Mr. Shanahan and Mr. Robinson; and eventually they agreed on $500.00.

Thereupon, the question of how the money was to be paid was discussed, and it was then agreed by the representative of the National Labor Relations Board, by Mr. Robinson, Mr. French and Mr. Shanahan, that Mr. Robinson would go up there and pay—

Is that correct?

It was agreed it should be paid to Mr. Lepie through Mr. French, president of the Union. But Mr. French took

over, and Mr. Robinson sent the check direct to him and he paid for the employees.

REFEREE SMART: I want to understand now. Did Mr. Lepie agree to this?

MR. LEPIE: Absolutely not.

MR. VOSE: Your Honor, I just want to say at this point, it is our position that there is no evidence before you establishing the facts which he is reciting.

REFEREE SMART: Yes there was.

MR. NATHANSON: We asked Dave what happened, the last day you weren't here.

MR. VOSE: I have been informed as to what went on here.

REFEREE SMART: I want to know: Did Mr. Lepie agree to this $500.00 settlement?

MR. NATHANSON: Yes, your Honor.

REFEREE SMART: And he represented the National Labor Relations Board?

MR. NATHANSON: Yes, your Honor. And thereupon, Mr. French, the representative of the Union, asked Mr. Robinson for the money that he would deliver to the men in the proper proportions. Mr. Robinson gave Mr. French the money, and the evidence was, your Honor, that he paid these four men but he deducted Union dues.

REFEREE SMART: I remember.

MR. NATHANSON: And the matter rested at that time, and the four of them signed releases. And the four men then complained to Mr. Lepie that the Union dues had been deducted, and Mr. Lepie then informed Mr. French that he had no right to deduct the Union dues and directed Mr. French to pay the amount deducted to these four men, so that the four men got the whole $500.00.

REFEREE SMART: Mr. French was a witness before me.

MR. NATHANSON: Yes, your Honor; Mr. French was here.

Now your Honor, so that it shall not be stated that we are holding back anything, we will now put on Mr. Robinson again, to explain the history of the Company, just so that your Honor will again hear that these men actually lost nothing, that there was no back pay due them.

REFEREE SMART: Just a minute, before you go on with that. Did you people know about the proceedings in the Circuit Court on their National Labor Relations Board order?

MR. NATHANSON: It is in compliance with that order that we have acted, that all these actions took place, your Honor.

REFEREE SMART: It was after the judgment was entered in the Circuit Court of Appeals?

MR. NATHANSON: Before.

REFEREE SMART: Why didn't you go up there?

MR. NATHANSON: Because at that time, your Honor, we took the position that that decree merely affirmed the order and that the order had been complied with.

REFEREE SMART: Did you know they made a finding of $8,000?

MR. NATHANSON: No, your Honor. There was no such figure. In other words, the decree of the Court that you have before you merely says that the order shall be carried out; and our position was that the order was carried out.

REFEREE SMART: Was the order for payment of $500.00?

MR. NATHANSON: Merely order for payment of back pay; I mean, for reinstatement or the back pay. And of course the offers of reinstatement had been made and we owed them the back pay, and we claimed that was paid, your Honor, so that there is nothing due.

Now, your Honor, I will show through Mr. Robinson the following: that these men were on the payroll of the Hill Company.

REFEREE SMART: Of the Hill Company?

MR. NATHANSON: Of the Hill Company.

I will show the following through Mr. Robinson: that these men were discharged in March, when the strike took place, and then in June, the Hill Company practically ceased operations. They only kept one man to wind up the company.

REFEREE SMART: That was during the war; then when the war was over the employees started business.

MR. NATHANSON: Yes, your Honor; then the other employees were looking for work, so the MacKenzie Company hired most of the other men. But even so, your Honor, the MacKenzie Company operations are seasonal, so that they run from May 15 to December 15; and so that after December 15, your Honor, they would have not been employed anyhow. So that these computations that you have before you, based on all these weeks, that they would have worked either 60 weeks, 29 weeks, 25 weeks, or 68 weeks, are pure fiction.

REFEREE SMART: Who made up the computation?

MR. NATHANSON: They did.

REFEREE SMART: Who is "they"?

MR. NATHANSON: National Labor Relations Board.

REFEREE SMART: What individuals?

MR. VOSE: Mr. Jaworski.

REFEREE SMART: I am very much interested to learn how you made such computation.

MR. NATHANSON: May I state, your Honor, that in one of these letters it has been said that we haven't cooperated; and every time we said, "Here are our books, here are the Hill books, look them over," that this man went to look over the Hill books. We gave him every ac-

cess to examine the books, and his findings should substantiate what I said.

And the MacKenzie books were open to his inspection. We have made every cooperation. Our position has been right along that there is no back pay due them, that they were fully paid when they got the $500.00.

Now I will put on Mr. Robinson to testify.

MR. VOSE: May we have Mr. Lepie make a statement as to his recollection as to what occurred, what witnesses were produced at the previous hearing?

MR. NATHANSON: Just a minute. In the brief where your office is citing the many cases, you have taken the position that the burden is on us to show that we fully cooperated and paid what is due. I want to put on our case; then you put on your case. In other words, you have taken a position in this matter here. I don't want to admit it, but I don't want to be technical about it.

Mr. Robinson.

REFEREE SMART: Have you been sworn, Mr. Robinson?

MR. ROBINSON: I was sworn the last time up here.

MR. NATHANSON: Yes; he was sworn.

GERALD ROBINSON, a witness called by and on behalf of MacKenzie Coach Lines, Inc., having been previously sworn, was examined and testified as follows:

Direct Examination

BY MR. NATHANSON:

Q. What is your name? A. Gerald Robinson.

Q. Where do you live, Mr. Robinson? A. 50 Magnolia Avenue, Lynn.

Q. Were you an officer of the Hill Company? A. Yes.

Q. What office did you hold? A. Treasurer.

Q. Do you remember when these people were discharged? A. Yes.

Q. In March, 1946? A. That's right.

REFEREE SMART: Name them so we will know who they are, for the record.

BY MR. NATHANSON:

Q. The men are Harold J. Bartlett, Gerry S. Kimball, Alkernon F. Nichols, and Robert Varney. Were all these four discharged in March? A. Yes, they were.

REFEREE SMART: Why were they discharged?

MR. VOSE: Your Honor, I wish to object to that question. That issue has been determined by the Board in a proceeding in which it had exclusive jurisdiction to determine that question. It is not open before the Referee.

REFEREE SMART: The reason for the discharge?

MR. VOSE: Yes, your Honor. The Board has made a determination, after statutory proceedings under the National Labor Relations Act, that these men were discharged in violation of that Act. It has ordered these men reinstated and that they be made whole for their losses; and as indicated in our Petition for Rehearing, it is our position that that determination is binding upon this Court and it is not at liberty to go behind it.

REFEREE SMART: What do you say to that?

MR. NATHANSON: I say we don't care one way or the other. It is not material. Assuming that all that is so, we are not interested in going behind the discharge, your Honor.

REFEREE SMART: All right.

BY MR. NATHANSON:

Q. Now, was Clifford R. Bunn also discharged then? A. Yes.

REFEREE SMART: Have you named all four men?

MR. NATHANSON: There is a fifth man; I didn't realize. I just asked, but it is hard to get an answer, whether he is included.

BY MR. NATHANSON:

Q. Was he discharged then too? A. Yes.

Q. That was in March 1946. For how long a period did the Hill Company continue to operate, after the discharge? A. They continued to employ mechanics until June 19, 1946.

MR. VOSE: Your Honor, I would like a continuing objection to any line of inquiry which goes into the computation of the amount of back pay. Just as it is our position that the determination as to whether the men were unlawfully discharged is solely the province of the Board, so it is our position that the determination of the amount of back pay is the sole obligation or the sole duty of the Board to determine.

If I might explain the procedure under the National Labor Relations Act a bit—

MR. NATHANSON: You objected.

May I state why that objection is absurd? He has given a brief in support of that objection. I have examined the cases cited, and the cases show exactly the opposite. In the very first case he cites the petition for contempt of court goes into computation.

May I also state, your Honor, that under the form of decree, that form of reasoning in the case of plaintiff, he now says plaintiff is the National Labor Relations Board. In that case he wants to say that the plaintiff himself is the only one who can say whether he has been paid. Obviously that would be absurd.

MR. VOSE: May I be heard further in respect of that?

REFEREE SMART: Yes.

MR. VOSE: Our position is that the Board is the one to make that determination and that determination is reviewable in the manner provided in the National Labor Relations Act, that is, by the Court of Appeals, just as any order of the Board.

Let me explain that the original decision and order of the Board, in any case of this kind, does not say "pay a specified amount." It says, "make them whole for their losses."

Customarily, after entry of a court order or court decree enforcing it, the parties get together and sit around a table and see if they can't agree on amounts.

REFEREE SMART: He says they did sit around and agree on $500.00.

MR. VOSE: That of course we deny.

REFEREE SMART: That is a question of proof, isn't it?

MR. VOSE: That is a question of proof, and I certainly concede your Honor has the power to decide that question.

REFEREE SMART: Yes.

MR. VOSE: After sitting around the table, if unable to reach an agreement, machinery exists under the statute for resolution of these claims, as the Court has cited in the *Burke Machine* case. They say: the Board conducts supplemental hearing; the Trial Examiner is sent out; there is a formal hearing.

REFEREE SMART: I understand that. See if we agree to this. Their position is that the National Labor Relations Board and the president of the Union and the men agreed on $500.00 as the amount.

MR. VOSE: That is the assertion of counsel, not testimony of any witness.

REFEREE SMART: Yes it was testimony of a witness. We will go into that again, of course.

Do I understand that you concede that that is for me to decide, the question on the proof, whatever the evidence may be one way or the other?

MR. VOSE: It is for you to decide whether there has been a compromise settlement or payment in full. That is certainly something that is for your Honor to decide.

REFEREE SMART: Yes, that is as I understand it.

MR. LEPIE: Mr. Referee, may I just make one statement?

MR. NATHANSON: I object, your Honor. Since there is only going to be one case.

REFEREE SMART: All right.

MR. LEPIE: The only reason I desire to make a statement—

MR. NATHANSON: Mr. Referee, will your Honor rule on my objection?

REFEREE SMART: He may go along.

MR. LEPIE: If the Court will allow me.

REFEREE SMART: All right.

MR. LEPIE: Mr. Vose, as you know, was not present at the last hearing. I appeared on behalf of the Board at that time, and if you will recall, during the whole course of the hearing it was merely, for all intents and purposes, argument by myself, argument by Mr. Friedman, and argument by Mr. Nathanson. The only witness sworn at that proceeding was Mr. Robinson, for about three minutes, after which I stated I was not prepared to go through a formal proceeding; that I would make available to the Referee, if I secured permission, the transcript of the original proceedings. The hearing was then adjourned, subject to my making available the transcript to the Referee.

REFEREE SMART: Have you ever done it?

MR. LEPIE: I have not, sir. I have never secured permission.

REFEREE SMART: Have you tried to get permission?

MR. LEPIE: Yes, sir.

MR. VOSE: Yes, your Honor, he has tried. They sent a memorandum requesting authority to be able to submit it.

REFEREE SMART: Why shouldn't I have that transcript?

MR. VOSE: Because the issue has been determined by a tribunal that is competent to try the case and it is just part and parcel of our position here, that the issues decided there are not open before your Honor.

Now, there is a transcript on file in the Court of Appeals here, and if your Honor wants to look at it, it is certainly available there; but consistent with our position that those matters are not open for decision before your Honor, we thought we shouldn't furnish it.

So he did try.

REFEREE SMART: As I remember, there were two or three witnesses.

MR. NATHANSON: That is right, your Honor; that is for your Honor's memory.

MR. LEPIE: That is only my best recollection on it. I don't want to take an opposite position. But he was the only person sworn under oath.

REFEREE SMART: I think I have some notes on it. They were all sworn; all three of them were here.

MR. NATHANSON: I remember distinctly that you said to Mr. Shanahan, "You are a lawyer; we don't have to swear you." And he testified.

REFEREE SMART: That's right.

MR. LEPIE: I have no such recollection.

MR. SHANAHAN: May I say a word to your Honor?

REFEREE SMART: All right.

MR. SHANAHAN: Might I say, your Honor, that I have here, dated November 16, 1948, a letter from the Assistant General Counsel of the National Labor Relations Board, Mr. A. Norman Somers, addressed to Honorable Roger A. Stinchfield, Esq., Clerk of the United States Court of Appeals for the First Circuit here at Boston, re: National Labor Relations Board, Hill Transportation, and MacKenzie Coach Lines.

And this I think will straighten it all out in your Honor's mind, from the beginning right up to date.

"Dear Mr. Stinchfield:

Enclosed herewith an original and three copies of a petition of the National Labor Relations Board, to enforce its order in the above matter, together with the entire certified record consisting of the pleadings, testimony, and evidence upon which the order of the Board was entered, and including the findings and order of the Board.

In accordance with Section 10(e) of the National Labor Relations Act as amended, will you kindly notify the Respondents, Hill Transportation and MacKenzie Coach Lines, both doing business at 29 Daniel Street, Portsmouth, New Hampshire, and Mr. Louis K. Nathanson, Trustee in Bankruptcy, 53 State Street, Boston, Mass., of the filing of this petition and records.

Copies of the petition for enforcement and certificate of record were served today by registered mail upon Respondents' counsel, Messrs. Hughes & Burns, Dover, New Hampshire [he was counsel for Hill], and upon said Trustee in Bankruptcy. Proof of service will be forwarded later.

Sincerely yours,
A. NORMAN SOMERS
Assistant General Counsel."

A copy of this was sent to Mr. Nathanson, to Hughes & Burns, attorneys of Dover, New Hampshire, to the Hill Transportation, and the MacKenzie Coach Lines, at 29 Daniel Street, Portsmouth, New Hampshire, to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 633, AFL, attention Messrs.

Basil D. French and Harry Parr, who are business agents of that Local, at 801 Elm Street, Manchester, New Hampshire; copies to First Region, NLRB.

Following receipt of that letter, I came in to see Mr. Zack, whom I personally have known for many, many years.

REFEREE SMART: Who is Mr. Zack?

MR. SHANAHAN: Chief Law Officer of the National Labor Relations Board in Boston.

He called in Mr. Lepie. We discussed the matter of the pay to these four men. One man was definitely out of the picture. I think his name was Bunn.

MR. NATHANSON: Clifford R. Bunn.

REFEREE SMART: What do you mean?

MR. SHANAHAN: He has gone away to parts unknown. Nobody knew where he was, but we had a release from him anyway. So that left four men. And I told Mr. Lepie and Mr. Zack—

REFEREE SMART: Are you listening to this, Mr. Lepie?

MR. LEPIE: I'm listening.

MR. SHANAHAN: —that the claim these men represented to me was $800.00; that we didn't agree to that amount, but that Mr. Robinson, the treasurer of Hill, had been talking with Mr. French, the president of this Union who represented the four men, and that they had tentatively agreed, subject to the approval of the National Labor Relations Board, to accept $500.00 in full settlement of their four claims for wages.

REFEREE SMART: And who in behalf of the National Labor Relations Board approved that?

MR. SHANAHAN: Well, I am coming to that in just a minute. Then your Honor can draw your own inferences.

Mr. Lepie said that so far as he was concerned, if that was the view of the four men—that they were willing to

take the $500.00, that the National Labor Relations Board through his office would offer no objection.

REFEREE SMART: Mr. Lepie said that?

MR. SHANAHAN: Mr. Lepie said that; but that he wanted to make sure that that was what the men were willing to take. And he suggested that he and I go to Manchester, I think it is, in New Hampshire, talk with Mr. French, the business agent, talk with the men if necessary, and find out if that amount was acceptable to them, namely $500.00.

I told Mr. Lepie that I was very busy; that I saw no reason why he couldn't go himself because I trusted him and his supervisor that he worked for—had the utmost confidence in them both.

REFEREE SMART: Who is his supervisor? Mr. Zack —that gentleman there?

MR. SHANAHAN: Yes, sir.

That he could go to New Hampshire and satisfy himself, and if $500.00 was satisfactory, we would forward the money. Mr. Lepie requested I direct it to his office and he would transmit it to Mr. French.

I think there was some further talk that I would have Mr. Robinson, who is on the witness stand, meet Mr. Lepie and drive him to Manchester; and that was agreeable.

I reported to Mr. Robinson when I got back just what I have told your Honor, and he contacted Mr. French; and Mr. French said there was no need of anybody coming to Manchester, that the men were perfectly satisfied to accept the $500.00 in settlement of their claim. Whereupon, Mr. French told Mr. Robinson that instead of sending the check to the National Labor Relations Board, to send it to him and he would pay the men and would secure and sign the necessary release.

Mr. Robinson, without any knowledge, sent the check to Mr. French for $500.00.

REFEREE SMART: To whom was the check payable?

MR. SHANAHAN: Payable to Mr. French, I think.

THE WITNESS: Payable to the Union, as I remember.

REFEREE SMART: All right.

MR. SHANAHAN: And Mr. French then signed and sent back a release.

REFEREE SMART: That release, has that been offered in evidence?

MR. NATHANSON: We showed it to your Honor last time.

REFEREE SMART: Where is the release?

MR. SHANAHAN: The original release is filed in court. I will come to that in just a minute, your Honor.

REFEREE SMART: I see.

MR. SHANAHAN: Mr. French then sent to Mr. Robinson the release that I speak of. I am sorry if I said the release was filed in court. They have the release signed by the president of the Union.

MR. VOSE: Either the original or a conformed copy.

REFEREE SMART: Will you please produce it. I want to see that.

MR. VOSE: Yes, sir.

MR. SHANAHAN: Let me just check my file for a moment.

I sent the original release signed by the Union to Mr. Samuel Zack, Chief Counsel for the National Labor Relations Board here in Boston, under date of December 18, 1948.

MR. VOSE: Is this the document you are referring to?

MR. SHANAHAN: It looks like it.

THE WITNESS: May I see it?

REFEREE SMART: Do you say that is the release?

MR. VOSE: I want Mr. Lepie to say whether there were individual signed releases received from the men.

MR. SHANAHAN: No.

MR. LEPIE: That is the only release which came to my attention.

THE WITNESS: Yes, sir; I believe that is it.

REFEREE SMART: Let me see it.

MR. VOSE: We undoubtedly have a copy, if you would like to introduce it or anything like that.

REFEREE SMART: And that was sent to Mr. Zack?

MR. SHANAHAN: That's right, your Honor.

REFEREE SMART: Have you a letter accompanying it?

MR. SHANAHAN: Yes, your Honor.

REFEREE SMART: I want it introduced in evidence.

MR. VOSE: There is a conformed copy.

MR. NATHANSON: We are offering that.

REFEREE SMART: What is that?

MR. SHANAHAN: This is a copy of this release that your Honor has just read.

REFEREE SMART: All right.

(Thereupon, the document above referred to was received in evidence.)

MR. SHANAHAN: Under date of December 18, 1948, I addressed this letter to Mr. Zack, Chief Counsel of the National Labor Relations Board in Boston.

"Dear Sam:

I enclose release from Local No. 633, for Messrs. Harold Bartlett, Varney, Nichols and Kimball, together with certificate of compliance with court order,—

REFEREE SMART: Where is the certificate?

MR. SHANAHAN: It is in court. I will come to that in a minute.

REFEREE SMART: Have they got it?

MR. SHANAHAN: The original is in court.

REFEREE SMART: You sent it to them?

MR. SHANAHAN: To file in court—certificate of compliance with decree of the court.

REFEREE SMART: Have you got that?

MR. VOSE: We haven't the original of it. I may be able to find you a copy.

I might say further, the normal procedure is for that to be filed with us.

MR. FRIEDMAN: It was.

MR. VOSE: I think he said it was filed in court.

REFEREE SMART: It was sent to him.

MR. SHANAHAN: I sent the original.

REFEREE SMART: I want the original.

MR. LEPIE: We have the original.

REFEREE SMART: Let me have that.

MR. VOSE: I have a copy which I can make available.

REFEREE SMART: Have you been through this file?

MR. VOSE: Yes, sir.

REFEREE SMART: Do you know what is in here?

MR. VOSE: Yes, sir.

REFEREE SMART: This was received December 28.

MR. SHANAHAN: Dated December 18, 1948, letter addressed to Mr. Zack:

"Dear Sam:

I enclose release from Local No. 633 for Messrs. Harold Bartlett, Varney, Nichols and Kimball, together with certificate of compliance with court order and which I would appreciate if you would have Joe Lepie file it for me in court."

REFEREE SMART: Mr. Lepie, did you file it?

MR. LEPIE: I did not, sir.

REFEREE SMART: Why not?

MR. LEPIE: Because usually—

Do you want to make a statement?

MR. VOSE: That report is filed—

REFEREE SMART: I am asking him. He was requested to file it. It was mailed to him.

MR. SHANAHAN: I said we had complied with the order of court and I asked him to file it.

REFEREE SMART: Did you file it?

MR. LEPIE: I did not. We are not obliged to do so.

MR. SHANAHAN: Hill Transportation, your Honor, was ordered, in a decree that I read to you, to comply with the order of the court.

REFEREE SMART: What is the date of that order?

MR. SHANAHAN: Of the decree?

REFEREE SMART: The decree ordering compliance.

MR. LEPIE: December 7, 1948. A copy of the decree is attached to the Proof.

REFEREE SMART: Why does the decree say that this is in compliance with that decree? I want to see what the decree was.

MR. VOSE: There is the decree.

REFEREE SMART: Do you have a copy of that?

MR. VOSE: You have it. This is part of our Proof of Claim that is right before you now.

MR. SHANAHAN: Do I understand, your Honor, that the decree of the court is that we file an affidavit that we have posted, and that we have complied with the order of the National Labor Relations Board on the matter of adjustment of wages?

REFEREE SMART: It says December 7, Order of Judgment, as follows: Order of National Labor Relations Board, February 4, 1948—that is what I want to see, February 4. That can't be right.

MR. LEPIE: That is the court decree.

REFEREE SMART: Where is the original of the order of February 4?

MR. VOSE: Here is February 4, and here is the order of the Board. I can point out to you quickly the provision

in question. It is way over here. It was pursuant to Provision 2(e) that this compliance report was furnished, and you will note that the only—

REFEREE SMART: Does the original order specify how much is to be paid?

MR. NATHANSON: No, your Honor.

MR. SHANAHAN: I have it here, the petition for enforcement.

REFEREE SMART: I want that original, February 4. This is one of December 7.

MR. SHANAHAN: The one your Honor wants is a petition that was filed in the United States Court of Appeals on November 18, 1948. It is a petition of the National Labor Relations Board, setting forth this matter of their hearings, and so forth; and then goes on to ask that an order issue from the court that upon the entire record in the case, pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondents, Hill Transportation Company and MacKenzie Coach Lines, Inc., and their officers, agents, successors and assigns shall:

1. Cease and desist from (a) discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, etc.; (b) refusing to bargain collectively with the International Brotherhood of Teamsters, Chauffeurs, etc.; (c) in any other manner interfering with, restraining or coercing their employees in the exercise of the right to self organization to form labor unions, etc.;

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Elwyn Bartlett, Harold Bartlett, Alkernon Nichols, Robert Varney and C. R. Bunn immediate and full reinstatement to their former or substantially equivalent positions without prejudice;

(b) Make whole in the manner set forth in "the remedy" the persons whose names appear in Appendix A of this Order for any loss they may have suffered by reason of the Respondents' discrimination against them.

MR. NATHANSON: That is the clause that all this is about.

MR. SHANAHAN: That is the order.

REFEREE SMART: Read that again, please.

MR. SHANAHAN: Make whole in the manner set forth in "the remedy" the persons whose names appear in Appendix A of this Order for any loss they may have suffered by reason of the Respondents' discrimination against them.

In short, pay them what you owe them; that is what it means.

REFEREE SMART: All right.

MR. SHANAHAN: Then under (c) we were directed to bargain collectively with this Union; and (d), post immediately at their garage and repair shop at Hampton, New Hampshire, copies of the notice attached hereto and marked Appendix A(1); and (e), notify the Regional Director for the First Region, Boston, Massachusetts, in writing within 10 days from the date of this Order what steps the Respondents have taken to comply therewith.

It was in compliance with that, that I came to Boston, talked with Mr. Lepie as I have indicated to you, the check was paid to Mr. French as I have indicated to you, and the release from Mr. French was given. Then I sent to Mr. Lepie the letter which I was reading—and unfortunately I haven't finished reading it yet.

MR. LEPIE: Are you referring to the letter?

MR. SHANAHAN: Letter dated December 18, 1948, from myself to Mr. Zack. I have read your Honor the first paragraph.

"Elwyn Bartlett is not named in this settlement because he previously had been paid, and C. R. Bunn is

of parts unknown but has signed the release. Mr. Parr handled this matter, and when he gave our Mr. Robinson the enclosed release, the latter gave his check payable to the order of the Local.

"With kindest compliments of the season to yourself and Joe Lepie, I am

"Sincerely,"

REFEREE SMART: That is letter to Mr. Zack, dated December 18, 1948; and this order was dated?

MR. SHANAHAN: That was in accordance with this petition dated November 18, 1948, that I read to your Honor.

REFEREE SMART: And the order of the court was what?

MR. NATHANSON: December 7.

REFEREE SMART: That is what I wanted to know.

MR. SHANAHAN: Now, I heard no more about it. I received no letters, telephone calls or anything, until, on April 16, I received a letter signed by Mr. Lepie, dated April 15, 1949, in the matter of the Hill Transportation.

REFEREE SMART: Meantime, when was MacKenzie Coach adjudged bankrupt?

MR. NATHANSON: June 1947. It was in bankruptcy already.

REFEREE SMART: All right; go ahead.

MR. SHANAHAN: I received the letter dated April 15, 1949, in which Mr. Lepie asked me if I was still representing the Hill Transportation Company.

REFEREE SMART: Was MacKenzie Coach Lines mentioned in any of these things?

MR. NATHANSON: That is the attitude we took, your Honor, at that time.—

REFEREE SMART: These letters and all this correspondence and everything.

MR. SHANAHAN: Is with the Hill Transportation Company.

REFEREE SMART: It says here: Hill Transportation and MacKenzie Coach Lines, Inc.

MR. NATHANSON: The order was made against both. They didn't know themselves who were the employees.

REFEREE SMART: It says here: Hill Transportation and MacKenzie Coach Lines—both included in everything.

MR. SHANAHAN: That's right; that is the way this petition treats it.

I received this letter from Mr. Lepie, asking if I am still interested, representing Hill, and if so he would appreciate it if I would kindly communicate with him with reference to disposing of this matter; otherwise, it might become necessary to petition the court for contempt because of Hill's failure to comply with the court decree.

This was in April, 1949.

REFEREE SMART: That letter was from Mr. Lepie?

MR. SHANAHAN: Yes, sir.

REFEREE SMART: Four months after you had made your settlement?

MR. SHANAHAN: Yes, sir. I came into Boston and met Mr. Lepie, and he stated that since I had last talked with him—Oh, he explained to me that because Mr. French had deducted the dues for these four men out of the check,—

REFEREE SMART: Was that the first you knew about that?

MR. SHANAHAN: That's right; it was all news to me. I had nothing to the contrary in the meantime that I am aware of.

And in April of 1949 Mr. Lepie said that it was necessary that he go ahead and enforce the decree of the court, and that he or someone under his direction had searched the

social security records and had gone back and found that these men were owed $5500.00.

I told him so far as Hill Transportation Company was concerned, that they had gone out of business; and I satisfied him by sending him a copy of our federal return for 1948, that we had done no business. And I think they are satisfied, from their examinations of the books that they made here recently, that Hill was substantially out of business at least so far as mechanics were concerned, in June of 1946, three months after the strike in March of 1946.

At the last hearing, I asked Mr. French to come down here without a summons, and he came. He is the president of the Union. And when we were about to finish, I told your Honor that Mr. French was here, that he had heard what I had told your Honor, which was substantially what I have said today. And Mr. Lepie wanted a continuance, and I wanted it understood that Mr. French was here, that he was the president of the Union, and I didn't want any continuance dependent upon his coming back again; if he was here, he should testify if anything I had said was—to use the slang—off color.

REFEREE SMART: And he adopted what you said?

MR. SHANAHAN: He adopted what I said.

REFEREE SMART: One more thing I'd like to know. Were the dues that were deducted subsequently paid over to the men?

MR. NATHANSON: So stated last time.

REFEREE SMART: By whom?

MR. NATHANSON: By Mr. French and Mr. Lepie.

MR. LEPIE: Mr. French was not here, your Honor; they are referring to Harry Parr who was here.

MR. NATHANSON: The man who was here.

MR. SHANAHAN: Oh, that was Mr. Parr who was here. I'm sorry.

MR. NATHANSON: I didn't know Mr. Parr was here, and he so stated.

REFEREE SMART: Mr. Parr represented the Union?

MR. SHANAHAN: That's right.

MR. NATHANSON: Mr. Parr stated then—or Mr. Lepie stated—to your Honor, that upon Mr. Lepie's direction—

MR. LEPIE: Now just a minute.—All right, go ahead.

REFEREE SMART: Go ahead.

MR. NATHANSON: That the amount of Union dues deducted was restored to the men.

REFEREE SMART: And the men got it?

MR. NATHANSON: The men got it, yes.

REFEREE SMART: In full, $500.00?

MR. NATHANSON: Yes.

MR. VOSE: We don't dispute that, your Honor, that they were paid the full $500.00 without any deductions for dues or advances.

REFEREE SMART: Well, what is your claim?

MR. VOSE: Our claim is for $4400.00.

REFEREE SMART: I know that. But on what do you base your claim? Your department approved settlement of $500.00 and it was paid to their order as compliance with the court order.

MR. VOSE: Your Honor, Mr. Shanahan in his statement hasn't said that the Board approved that. And of course it is our position—

MR. SHANAHAN: I think in fairness to me you ought to return the $500.00. We are not running a philanthropic institution down there in Essex County. You either ought to return it or—

REFEREE SMART: Wait a minute. They have accepted it.

MR. SHANAHAN: They accepted it and I heard nothing from them until the following April, when Joe Lepie told me they wanted $5500.00.

REFEREE SMART: When they accepted the $500.00, didn't Mr. Lepie say that was in compliance?

MR. SHANAHAN: He would go and find out if it was satisfactory to the men; if it was, he would recommend they take it.

MR. VOSE: Well, when they finish, I would like to show—as a matter of fact, the record shows Mr. Shanahan just testified that they got together and, with the understanding that only $800.00 was due, the Regional Office thought it would tentatively be willing to go along on settlement, but wanted Mr. Lepie to go up to New Hampshire to check with the men themselves.

REFEREE SMART: Do you know if they were satisfied?

MR. VOSE: I don't know. I dispute it.

REFEREE SMART: That is what he went up there for.

MR. VOSE: Not to see if they were satisfied; to check and find out the amount they had coming to them. We had only the statement of the Union man.

MR. NATHANSON: May I go on from here?

REFEREE SMART: I am asking Mr. Vose.

It seems to me—I can't understand how an important department of this Government can try to build up a $500-claim to $8,000 or $5,000 and try to get it on a technicality. It doesn't seem honest nor fair or decent.

MR. VOSE: You haven't heard our evidence, and when they get through we will be glad to put in our evidence.

REFEREE SMART: All right.

BY MR. NATHANSON:

Q. Mr. Robinson, these five men, Bartlett, Bunn, Kimball, Nichols and Varney, were all mechanics? A. Yes sir.

Q. And they were on the payroll of the Hill Company? A. That's right.

Q. Were these five men ever on the payroll of the

MacKenzie Company? A. Not up to that time. It is possible they may have come on at some later date.

Q. Up to that time? A. No. You are talking about—there are two Bartletts here.

Q. I mean Harold Bartlett. A. That's right.

REFEREE SMART: Were they ever on the payroll of the MacKenzie Company?

THE WITNESS: No.

MR. FRIEDMAN: Up to the time of the strike.

REFEREE SMART: Fix the date.

BY MR. NATHANSON:

Q. In March, 1946, they were on the payroll of the Hill Company? A. That's right.

Q. And not on the payroll of the MacKenzie Company? A. That's right.

REFEREE SMART: Did the books show that?

THE WITNESS: Yes.

REFEREE SMART: How could that man go up there and figure up five or six, seven hundred dollars for the MacKenzie Coach Lines?

MR. VOSE: If you would sit down with us, your Honor, with an open mind and willingness to examine the figures, I think we could show them; and Mr. Jaworski is here, he has his figures. After this hearing formally closes, he will be glad to go over them with all of you. But I want to reiterate our position, that the matter of the computation, if it can't be worked out informally, should go back to the Board and let the Board make formal determination of the amounts, and they can get it reviewed in the Court of Appeals.

REFEREE SMART: It doesn't sound sensible to me, that men would be willing to take $500.00 when they are owed $5,000.00. I don't believe it.

MR. VOSE: We haven't had a word of direct evidence that these men are satisfied.

REFEREE SMART: We have got a release from them.

MR. VOSE: A release signed by the Union on behalf of the men. There is nothing from the men.

REFEREE SMART: Didn't Mr. Shanahan say that the men were satisfied.

MR. SHANAHAN: According to Mr. French.

THE WITNESS: I also talked with one of the men in question here—Harold Bartlett—prior to going to the National Labor Relations Board, their going in there, and he was satisfied at that time personally to accept an amount he had stipulated was somewhere in the vicinity of $245 or around there.

REFEREE SMART: I can't understand. I want to know about this National Labor Relations Board—what they are trying to do. It doesn't seem fair, just, or honest so far as the evidence has gone; but I am not through hearing the evidence.

MR. VOSE: At this particular point let me say this. They may have been satisfied to the extent that they were told by their Union representative that all they had a chance of getting was $800.00 between them, and thinking that that was all that was coming to them—

REFEREE SMART: If they weren't on the payroll of MacKenzie Coach Lines, the bankrupt, how are they entitled to anything?

MR. VOSE: That was determined by the Board, your Honor.

REFEREE SMART: But supposing the Board says it is raining out now, and it isn't; does that make it so?

MR. VOSE: If the Circuit Court of Appeals says that, that makes it so.

REFEREE SMART: Well, it doesn't influence me.

MR. VOSE: Let me read you what the Board said, your Honor.

REFEREE SMART: I don't care what the Board said. I want facts. Does the Board say anything about this settlement?

MR. VOSE: It all took place subsequent to the entry of the Board's order.

REFEREE SMART: Well then, there was agreement.

MR. VOSE: Mr. Shanahan hasn't ever said that the Board approved this.

REFEREE SMART: He did say so.

MR. SHANAHAN: I said that I sent a release to your Board, the original release, and that I also sent the original certificate of compliance with the order of the court, signed by Mr. Robinson, treasurer of Hill, and asked Mr. Lepie to file that certificate and affidavit with the court so that the United States Circuit Court would know that the Hill Transportation Company had complied with its orders and with your orders. That was in December of 1948. I heard no more until April.

REFEREE SMART: Before that, you told me that you talked with Mr. Lepie and he agreed to the settlement on behalf of the National Labor Relations Board.

MR. SHANAHAN: He said if the men were satisfied to take it, that so far as the National Labor Relations Board was concerned they would have no objection.

REFEREE SMART: He told you that?

MR. SHANAHAN: Yes sir.

REFEREE SMART: That is what he thought.

MR. VOSE: But he wanted to find out by talking to the men themselves.

MR. SHANAHAN: I told him to go up and talk with the men, and he had from December to April to talk with them.

MR. VOSE: May I read into the record here a copy of a letter—it is the duplicate original of a letter mailed to Patrick F. Shanahan, Esq., 520 Grossman Building, 14

Central Avenue, Lynn, Massachusetts, January 16, 1946, three or four weeks after we received this affidavit of compliance.

This letter says, with reference to Hill Transportation Company and MacKenzie Coach Lines, Inc., Case No. 1-C-2823:

"Dear Mr. Shanahan:

I have been advised that your clients, Hill Transportation Company and MacKenzie Coach Lines, Inc., through Mr. Robinson, have paid to Local 633 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL, the sum of $500.00 as full settlement of back pay due to Harold Bartlett, Alkernon Nichols, Gerry Kimball, and Robert Varney.

As you know, this settlement was entered into without the prior approval of this office and therefore can have no binding effect so far as the liability of the companies is concerned. This is so notwithstanding any agreement you may have had with the Union and/or the individuals involved.

Furthermore,—

REFEREE SMART: Did you get that letter?

MR. SHANAHAN: If he says he wrote it. I haven't it in my file. It may well be, if he states it was sent. The reason may be, not that the settlement was all right, but that Mr. French and Mr. Parr had deducted the dues, then he notified me of that according to this letter.

MR. VOSE: I will continue.

"Furthermore, I have been informed that they have not received their proportionate share of the $500.00, Bartlett having been paid $128.80, Kimball $97.00,

Nichols $62.50, and Varney $135.63. Roughly, these amounts represent only fifty per cent payment on the back pay actually due and they will be considered as having been made on account of the total amounts due in order that full compliance may be effectuated in accordance with the terms of the outstanding decree. Proofs of claims for the differences will be filed with the Referee in Bankruptcy unless the companies are willing to reimburse these employees to the full extent of their loss of earnings.

Please let me hear from you.

Very sincerely yours,
BERNARD L. ALPERT,
Regional Director."

REFEREE SMART: Was there any reply to that letter from Mr. Shanahan?

MR. SHANAHAN: The letter probably may have been sent to me and I turned it over to the Trustee in Bankruptcy or the Receiver.

REFEREE SMART: Did you get it, Mr. Nathanson?

MR. NATHANSON: No. My feeling is this, your Honor. If they hadn't deducted the different amounts in back Union dues, they'd have been happy.

May I go on, your Honor, to show that even if everything they say is true, that actually $500.00 fully recompenses them for back pay.

REFEREE SMART: Go ahead.

BY MR. NATHANSON:

Q. Mr. Robinson, when we were interrupted you said that these men were on the payroll of the Hill Company? A. That's right.

Q. As mechanics? A. That's right.

Q. Now what happened to the Hill Company in June?

REFEREE SMART: What year?

BY MR. NATHANSON:

Q. What happened to the Hill Company in June of 1946? A. June 1946, and to all intents and purposes, they discontinued with a very, very small exception; but they employed no mechanics to any extent after that date.

Q. So that actually, as far as Hill Company was concerned, if they had been their employees in June, they would have been discharged? A. That's right.

Q. Because the Hill Company employed no more mechanics? A. That's right.

REFEREE SMART: Did these men work for the bankrupt, MacKenzie Coach Lines, at any time?

THE WITNESS: It is possible some of those men were employed by the MacKenzie Company after that date.

REFEREE SMART: After what date?

THE WITNESS: After June 1946.

BY MR. NATHANSON:

Q. I am only talking about Harold Bartlett, Gerry Kimball, C. R. Bunn, Alkernon Nichols and Robert Varney. A. I don't believe any worked for MacKenzie Coach after that date.

MR. VOSE: May I have a continuing objection to this line of inquiry?

BY MR. NATHANSON:

Q. The question is this: There were other mechanics employed in March, up to June, by the Hill Company. Is that true? A. Yes.

Q. Now in June of 1946, when the Hill Company ceased employing mechanics, did you offer those other mechanics —did the MacKenzie Company offer to employ any of those other mechanics? A. Not at that time.

Q. When? A. Not until after this decree.

Q. Not these mechanics, but the other mechanics employed by the Hill Company. A. I believe so, yes.

Q. MacKenzie Company employed some of them. Is that true? A. I think so, yes.

Q. Now assuming that those other men were hired by the MacKenzie Company, will you give the Court a picture of the MacKenzie Company operations? In other words, let me rephrase the question. The MacKenzie Company operated from May until December. Is that true?

REFEREE SMART: What year?

MR. NATHANSON: In any year.

BY MR. NATHANSON:

Q. When the MacKenzie Company was alive, it was a seasonal operation? A. That's right.

MR. VOSE: May I object to any questioning along this line? Will you allow me a continuing objection so I won't have to object to every question, on the basis that this is something to be determined by the Board?

REFEREE SMART: Well, it can be determined by me too.

BY MR. NATHANSON:

Q. That on December 16, 1946 until May 16, 1947, even the MacKenzie Company didn't employ mechanics of any consequence? A. No quantity or number; not nearly so many as they would between May 15 and December 15.

Q. So that even if these men had been employed by the MacKenzie Company, after December 15, 1946 and up to May 1947 they would have been off the payroll? A. They would have been off the payroll at least between December 15 and May 15.

MR. VOSE: I object also on the further ground that the records of the Company are the best evidence of the facts about which he is testifying. These records will bear out our contention, rather.

REFEREE SMART: Do you say that the records bear out the fact they employed mechanics during December and May?

MR. VOSE: Yes. However, I say that that is not an issue before this tribunal.

REFEREE SMART: Well, this is supposed to be a court of equity, you know.

MR. NATHANSON: Your Honor, that is all I called him for, to show, first, that as far as the Hill Company is concerned, operations ceased in June 1946; and in the second place, even if they had been employed by the MacKenzie Company, they would have not been employed after December 15, 1946 and to May 1947.

REFEREE SMART: When was the bankruptcy, again?

MR. FRIEDMAN: June or July of 1947.

REFEREE SMART: And when were these men discharged?

MR. NATHANSON: Discharged in March of 1946.

MR. SHANAHAN: The men were discharged by Hill in March of 1946.

REFEREE SMART: I want those dates.

MR. SHANAHAN: June 7, 1948, is the date of bankruptcy. They were in receivership—Mr. McGillicuddy of Malden was Receiver prior to that.

MR. LEPIE: 1948 they were in State receivership.

MR. NATHANSON: In January, 1948.

MR. LEPIE: Mr. Daniel McGillicuddy was appointed Receiver by the Superior Court.

REFEREE SMART: You ought to have all those dates in chronological order.

MR. NATHANSON: Your Honor, the Involuntary Petition will show it was filed on June 7, 1948, and it shows there was an assignment in February. In any event, your Honor, the bankruptcy begins in June, 1948; but they actually ceased operations in the winter previous, when the Receiver was appointed, in January.

REFEREE SMART: January of 1948—State Receiver?

MR. NATHANSON: Yes, your Honor.

REFEREE SMART: Are you through with this witness?

MR. NATHANSON: Yes, your Honor.

REFEREE SMART: You may cross examine.

MR. VOSE: Your Honor, I do not desire to cross examine Mr. Robinson, for the same reason that I have been objecting right along: that the things about which he has been testifying are things which I do not believe are relevant in this proceeding.

REFEREE SMART: Very well.

MR. VOSE: Will you just hear me out, your Honor.

I do want to say that if you will sit down and the Trustee will sit down with Mr. Jaworski, after this hearing is concluded, I think he can show you, by reference to data taken from the Companies' official payroll records—he went back a two-year period, back to 1945, and reconstructed payrolls of both Companies.

REFEREE SMART: Do you mean they hadn't been adequately paid from 1945 on down to the present period?

MR. VOSE: Merely trying to determine what the employment history of these two Companies was.

REFEREE SMART: That isn't the issue. The question, as I understand it, is: what would have been their future?

MR. VOSE: That is one of the fundamental things.

REFEREE SMART: Isn't that it?

MR. VOSE: You are right, your Honor; and what happened in the past—would they have kept on.

REFEREE SMART: I'd like to have him put on as a witness now.

MR. VOSE: Do you wish to call him?

REFEREE SMART: Yes.

MR. VOSE: We object to any testimony by Mr. Jaworski as to the basis of computations. We are willing to talk over the table here.

REFEREE SMART: I require that you present him in court.

MR. VOSE: For the same reason that I have been saying right along—it isn't something which is before the Referee to decide.

REFEREE SMART: Something you don't want me to know about?

MR. VOSE: I think the record will speak for itself, your Honor.

MR. NATHANSON: Do you want to offer any testimony?

MR. VOSE: Yes, I do, with respect to the settlement. Mr. Zack.

SAM G. ZACK, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. VOSE:

Q. What is your name, please? A. My name is Sam G. Zack.

Q. Where are you employed? A. Employed as Chief Law Officer for the National Labor Relations Board for the First Region, which is New England.

REFEREE SMART: How long have you been so employed?

THE WITNESS: I have been so employed, as Chief Law Officer, in Boston, since October 1941. I acted in the same capacity—

REFEREE SMART: I don't care about anything else. That relates to this case.

BY MR. VOSE:

Q. At some time in December 1948, was a conference held in your office at which Mr. Shanahan and Mr. Lepie

were present, and at which the present case was discussed? A. That is correct.

REFEREE SMART: Fix the date.

THE WITNESS: On or about December 10, 1948.

REFEREE SMART: Have you any memorandum on that?

THE WITNESS: No, I have kept no notes of that meeting; but there are references in the official Board's files with reference to that. There are references and memoranda in the official Board's file which helps me fix that date of December 10.

REFEREE SMART: Will you produce those references?

MR. VOSE: I object to the production of any information from the Board's informal files which are confidential. Anything which appears in the formal files, of course, we are willing to submit for your inspection.

REFEREE SMART: He says he fixes the date of that conference by references in your files. Now I'd like to have him produce them to see how he fixes that.

THE WITNESS: If I may be permitted to continue, it was my memory of the files, by statement made by Mr. Shanahan, that I am able to fix that date.

REFEREE SMART: All right.

BY MR. VOSE:

Q. Will you state for the Referee the discussion that was had at that conference? A. I think what Mr. Shanahan stated this morning with reference to the meeting that they had in which I participated, is substantially correct. Mr. Shanahan, Mr. Lepie and I met in my office, at which time they told me that—

REFEREE SMART: Who is "they"?

THE WITNESS: Mr. Lepie, Mr. Shanahan and myself, that were in that conference. When I say "they had", I refer to Mr. Lepie, Mr. Shanahan and myself.

REFEREE SMART: All right.

THE WITNESS: They were the only ones in at that conference. I don't know whether Mr. Robinson was there or not, but my impression is that he was not.

REFEREE SMART: Were you there, Mr. Robinson?

MR. ROBINSON: No, I was not.

THE WITNESS: Well then, we three were at that conference. At that time I was apprised by either one or both gentlemen of the desire on the part of Mr. Shanahan, or as counsel for his client, to effect a settlement of the back pay order contained in the Board's decision in the matter of MacKenzie Coach Lines.

REFEREE SMART: Which had been affirmed in the Circuit Court.

THE WITNESS: I don't think, at that time—

MR. VOSE: Yes; December 7.

THE WITNESS: Then it was three days after that; so that it was with reference to the decree of the court.

I had been apprised by the parties that—

REFEREE SMART: Whom do you mean by "the parties"?

THE WITNESS: Mr. Shanahan and Mr. Lepie. They were the only two in the office at that time.

Mr Shanahan or Mr. Lepie—I am not too sure which one—told me that the amount of back pay involved would be approximately $800.00. Mr. Lepie stated that he didn't know that to be the fact, but that he had been informed, as I recall it, by the Union representative, that that would be the approximate amount of back pay due to these men.

REFEREE SMART: And did they say from whom it was due?

THE WITNESS: From the Respondents, MacKenzie Bus and Hill Transportation.

REFEREE SMART: Which one of those two?

THE WITNESS: The Board's order and Court Decree ran against them jointly, as I recall.

MR. SHANAHAN: May I ask you from whom Mr. Lepie got the information about the $800.00?

THE WITNESS: I think he stated that he had received that from the Union representative through some letter, I believe. I am not too sure, but he had been informed to that effect, and that was the impression I had.

We discussed the matter of back pay, and Mr. Shanahan stated, as I recall it, that his man, Mr. Robinson, was able to raise $500.00 or was willing to produce $500.00 to adjust the matter of the back pay due to these men.

REFEREE SMART: As compliance with the order of the court?

THE WITNESS: That's right.

REFEREE SMART: And the National Labor Relations Board?

THE WITNESS: That is correct. And they wanted to know how I felt about accepting $500.00. In view of the fact that we had no definite figures as to how much—

REFEREE SMART: What was your answer?

THE WITNESS: I was just going to tell you, if I may be permitted to—

REFEREE SMART: I want your answer.

THE WITNESS: It is very difficult to give the answer without preface. I assure you I won't be unduly long.

REFEREE SMART: All right.

THE WITNESS: In view of the fact that neither Mr. Lepie nor I, and I think Mr. Shanahan—neither of us knew what the exact amount due to these men was, but were predicating it upon a figure of about $800.00 that we had received, I told Mr. Shanahan that the amount of $500.00 appeared to be a fair settlement in view of the circumstances, meaning the bankruptcy, and so forth, but that we can't say aye, yes or no to that; and I therefore suggested

that he get in touch with the Union people, and if they could satisfactorily work out a settlement on that basis, having in mind the $800.00 or the amount that we thought was due, and would so report to me, I would be inclined to recommend it to the Regional Director. He is the man who has charge of the office.

REFEREE SMART: Who is that?

THE WITNESS: Mr. Bernard L. Alpert.

It was then left that Mr. Shanahan would go up to speak to the Union people.

It was also suggested and agreed that Mr. Lepie would go along with Mr. Shanahan to Manchester, New Hampshire, to meet with the discharged employees or the Union representative, or both, and discuss the settlement. And I told him, however, whatever was agreed upon would have to be first submitted to me by Mr. Lepie or Mr. Shanahan and that I would then discuss it with Mr. Alpert. And as I stated, I told him I thought there would be no objection, I would recommend acceptance of the proffered $500.00 if it was on the basis of what we thought was due —the $800.00, and if it met with the approval of the men or their representative, Mr. Parr or Mr. French. And on that note we parted.

I think at the conference it was tentatively agreed upon —or maybe not agreed upon, but Mr. Shanahan was to go up with Mr. Lepie in the next few days to arrange for it. Not the next few days—I think probably they were to call each other and fix a definite date; and on that note the conference ended.

Thereafter, Mr. Lepie did not get in touch with Mr. Shanahan, nor Mr. Shanahan with Mr. Lepie. The fact is, they didn't get together and Mr. Lepie did not go to Manchester, New Hampshire. I don't know whether Mr. Shanahan went on up. But my impression is that Mr. Robinson went up and spoke to—I think it was Parr or

French of the Union, without the workers who were entitled to this back pay being present; and they too agreed upon $500.00 in settlement.

REFEREE SMART: Whom do you mean by "they"?

THE WITNESS: Mr. Robinson and either Mr. French or Mr. Parr.

REFEREE SMART: The Union representatives and the Respondent.

THE WITNESS: But before the Union representative agreed to accept, a call was put in by that Union representative to Mr. Lepie, to find out if it was all right to settle it without us being present—and by "us" I mean some representative of the Board.

REFEREE SMART: What did Mr. Lepie tell him?

THE WITNESS: Mr. Lepie was not in the office at the time, and the call was given to a Mr. Thomas H. Ramsey, who is a lawyer on my staff at the Board; and either Mr. Parr or Mr. French—whoever it may have been—spoke to Mr. Ramsey about the settlement or the proffered settlement and wanted to know if it was all right to go through with his discussion or settlement with Mr. Robinson. And Mr. Ramsey of our staff advised Mr. Parr or Mr. French that whatever settlement was arrived at, he should not make it final but that it was subject to the approval of the Regional Office.

REFEREE SMART: Did you hear Mr. Shanahan say that Mr. Lepie advised him it did have the approval of the Regional Office?

THE WITNESS: That it would have to meet with the approval of the office.

I don't recall that testimony. I was here.

REFEREE SMART: Didn't you so testify?

MR. SHANAHAN: Yes, your Honor. They both told me that it was satisfactory to them if the men were satisfied.

REFEREE SMART: That is what I understand the testimony was.

MR. SHANAHAN: They ordered me to go down to New Hampshire with Mr. Lepie, and I said "I'm too busy; I have other things to do. I will trust you. You go down, Joe, and if the men say they will take it, then we will buy." That is what I said.

REFEREE SMART: Now what do you say to that testimony?

THE WITNESS: I say that just isn't so. But I said that what Mr. Shanahan testified was substantially correct, and I told you, your Honor, that I thought—

REFEREE SMART: You didn't hear that testimony at all?

THE WITNESS: No, I didn't hear that.

MR. SHANAHAN: You were right in the courtroom.

THE WITNESS: Well, I just didn't hear that. Apparently I don't hear as well as you do, and I don't say that with any sarcasm. I know we did say it sounded okay to us, and that I did say I would recommend its acceptance providing all the other conditions were met, namely, the amount due the men.

REFEREE SMART: He testified that Mr. Lepie said that it met with the approval of the National Labor Relations Board if it met with the approval of the men. That was the only condition.

MR. VOSE: The record will speak for itself on that.

REFEREE SMART: Well, this is part of the record.

THE WITNESS: We were talking about an amount due of $800.00 to these men. We had, as I tried to convey to your Honor, no figures at all as to the actual amount due.

REFEREE SMART: Did you care about the figures if the men were satisfied?

THE WITNESS: Oh no, we never said that.

REFEREE SMART: I say, would you care if the men were satisfied?

THE WITNESS: Oh no.

REFEREE SMART: You wouldn't?

THE WITNESS: I would have reported to the Board that on a basis of an approximate figure, which we later learned to be about $5,000.00 due the men, that $500.00 was grossly inadequate.

REFEREE SMART: I doubt very much your $5,000 figure. In other words, show me how you got it.

THE WITNESS: Are you addressing that to me? I haven't the figures.

REFEREE SMART: I have asked to be shown, and they have refused. I can't understand, if men are willing to take $500.00, how somebody from Washington or Boston can go up there and figure it out to be six or seven thousand dollars.

THE WITNESS: Mr. Vose, of our Washington office, has indicated a willingness to show it to you. He merely feels—

REFEREE SMART: He said he wouldn't.

THE WITNESS: I thought he offered to show them to your Honor at the proper time.

MR. VOSE: I offered to show the Referee, informally, the complete basis for our computation. I want to show the Referee that we are fair. And if they can show we found there was a job there when there wasn't—that is it; we are open to reason.

MR. NATHANSON: There are too many jobs in the National Labor Relations Board, in my opinion.

MR. VOSE: Mr. Zack,—

REFEREE SMART: Wait a minute. Let me ask Mr. Zack some more questions.

I want to be sure I understand you correctly. I understand you say that if you had been satisfied that the men were satisfied—that is, those laborers—that you would have approved the settlement?

THE WITNESS: Yes, if it was the amount actually due the men.

REFEREE SMART: The men, they are the ones to decide, aren't they?

THE WITNESS: Oh no. This is a violation of a federal statute, and it is the Board that has to determine whether or not there has been compliance.

REFEREE SMART: But as a practical matter, if the men had been satisfied, you would have approved it?

THE WITNESS: If the amount due them was actually about $600.00, I would under the circumstances, in view of the bankruptcy, recommended approval of it. And I told Mr. Shanahan it sounded all right to me on the basis of the figure that was before us at that time, of six or eight hundred dollars due the men. I don't deny I told him that.

REFEREE SMART: If the Union had not deducted dues, the thing would have been all settled up, wouldn't it? You wouldn't have heard anything more about it.

THE WITNESS: I can't speculate what would have happened if certain things hadn't come to our attention. If it hadn't come to our attention and our investigation revealed it was about $800.00, that would have been the end.

REFEREE SMART: You wouldn't have investigated any further if they hadn't deducted the dues.

THE WITNESS: That isn't so. We have to make a complete report to Washington, and it would have been after we got this affidavit that we would have completed our investigation in order to make a complete and adequate report to Washington.

REFEREE SMART: It looks to me as though you agreed on the settlement and then you are welching on it.

THE WITNESS: That is your Honor's opinion. I can't go along with that. I'd like to finish my statement, if I may.

REFEREE SMART: Go ahead.

THE WITNESS: After the Union representative in Manchester had been advised by our Mr. Ramsey that any settlement would be subject to the approval of the Regional Office, we thereafter received a statement—I think it may have been what Mr. Shanahan read this morning—an affidavit of compliance, some settlement agreement Mr. Robinson had received from Mr. Parr or Mr. French indicating settlement on the basis of $500.00.

That came to our attention. Mr. Shanahan submitted it to us. And we then ascertained and found that the men did not get $500.00 but that the Union kept $250.00 of that money, and there was disbursed among the five men only $250.00. That is all the men got. Whereupon, we made—

REFEREE SMART: That is why the settlement didn't go through.

THE WITNESS: I can only say what happened, your Honor. I can't speculate. We did check and find that the men had received $250.00 of a settlement put through without our approval.

REFEREE SMART: You say without your approval. You just said you did approve.

THE WITNESS: Who approved? I didn't testify that we approved.

REFEREE SMART: You and Mr. Lepie both told Mr. Shanahan that if the men were satisfied it was satisfactory to the National Labor Relations Board.

THE WITNESS: I don't remember so testifying. What I tried to say is that when we got the settlement agreement signed by the Union representative which was given to Mr. Robinson, which Mr. Shanahan sent to us, we then learned for the first time that there was a settlement without our approval and it was a settlement made between Mr. Robinson and the Union without the Board being called in or without the men being consulted, and as a

result of that settlement with the Union representative the men received, in fact, only $250.00 in the aggregate.

Whereupon, we conferred then with the Regional Director, and as the result of Mr. Lepie's report to the Regional Director, the Regional Director thereupon wrote the letter to Mr. Shanahan—the letter Mr. Vose read—and stating in the letter that the settlement had been made without our approval and we disapproved the whole matter.

That, I think, is the story, in so far as I am familiar with it; except to add that the final word conveyed to the Company, or the final action in so far as settlement is concerned, was that Mr. Shanahan was notified in January 1948, within a few weeks after all this took place which I just related, that the settlement was not approved by the Regional Office.

REFEREE SMART: The compliance order which was mailed to you and which you were asked to file in court, was it filed?

THE WITNESS: No, it wasn't filed.

MR. SHANAHAN: Nor was it returned.

REFEREE SMART: Why didn't you return it, then?

THE WITNESS: I don't know. I didn't return it. It was filed with us as a statement of compliance. We investigated the case.

REFEREE SMART: You were requested to file it in court.

THE WITNESS: By Mr. Shanahan. That doesn't make it mandatory on us to carry out his orders, as his messenger boy. We didn't file it as he requested. We weren't obliged to file it in court as he requested. Compliance was to be made to the Board under the Board's order and under the court's decree, and not to the court. Therefore there was nothing we needed to file with the court.

REFEREE SMART: You received it as he testified on a certain day?

THE WITNESS: That is correct.

REFEREE SMART: And never returned it?

THE WITNESS: That is correct. It is still in our files.

REFEREE SMART: Did you ever write him a letter notifying him, prior to January 27 or '8 that it was in compliance?

THE WITNESS: I never wrote to Mr. Shanahan.

REFEREE SMART: Did anybody in the department?

THE WITNESS: I would like to help your Honor.—I don't like these interjections and these wavings of the hand by that gentleman there, whose name I don't know.

MR. NATHANSON: You just answer. You are a lawyer; and never mind telling me what to do. Just behave yourself.

THE WITNESS: I resent that very much. I am a member of the Bar and I resent the implication at I am not conducting myself in the proper manner.

REFEREE SMART: You are acting all right.

THE WITNESS: Thank you, your Honor. I am glad to know you are satisfied. Whether he is or not, I am not too much concerned.

BY MR. VOSE:

Q. At this December 10 or thereabouts conference, was it part of the understanding with which that meeting broke up, that Mr. Lepie was to go up to New Hampshire and attempt to ascertain from the men themselves whether the amount certified by the Union as being the total amount due was actually the total amount due? A. That was one of the prime reasons for Mr. Lepie intending to go up there, as you suggested, to ascertain what the amount of back pay actually was that was due the men.

REFEREE SMART: Didn't you testify before that he was to go up there to find out if they were satisfied with that settlement?

THE WITNESS: He was to go up there to find out whether or not the settlement was satisfactory on the basis of the information that we had in the files.

REFEREE SMART: And that the men had themselves agreed to.

THE WITNESS: That's right; from the men, to find out whether or not, based on the information we had in the files—

REFEREE SMART: You don't mean that you expected that Mr. Lepie was going to go up there and compute how much was due?

THE WITNESS: Oh yes, very definitely he was to find out whether the figure submitted by the Union agent was the correct figure.

REFEREE SMART: How was he going to find that out up in Manchester, New Hampshire?

THE WITNESS: Where the men live, your Honor. He was to go up and meet with the men.

REFEREE SMART: Yes, but simply to find out if the settlement was satisfactory to the men. That has been the testimony.

THE WITNESS: If that figure was correct, that figure of six or eight hundred dollars given to us by the Union agent.

REFEREE SMART: With the men.

THE WITNESS: With the men. And by "men" I mean the discharged employees.

REFEREE SMART: When we send a man out to check on a compliance, he is expected to come back with a complete report. If it means getting the records of companies, that is what I expect of the men.

MR. VOSE: Is that the usual procedure?

THE WITNESS: Very definitely. There is a complete ascertainment of the amount involved, and not hearsay, guessing or surmising. We have an order of the Board

and decree of the Court to carry out, and we try to be meticulous.

REFEREE SMART: The understanding I have received so far is that these employees never were employed by the bankrupt corporation. Now I would like to find out how in heaven's name the National Labor Relations Board made a decree that they were hired and paid by this corporation. That, I understand, you refuse to give me.

MR. VOSE: May I read to you a statement from the Board decision?

REFEREE SMART: I know the Board decision, but I want to know what is its basis; how did they get the information?

MR VOSE: The Board decision states the basis right in there. I think it would be helpful, since this is so crucial with you.

MR. NATHANSON: May I ask Mr. Zack a question, Mr. Referee?

REFEREE SMART: Yes; you have a right to cross examine.

MR. NATHANSON: Do you want to ask him any more questions, Mr. Vose?

MR. VOSE: Yes.

BY MR. VOSE:

Q. You mentioned a phone call to Mr. Lepie in his absence, and it was transferred to Mr. Ramsey? A. That is right.

Q. Is it your understanding that this phone call was received before any money was paid over to the Union representative? A. That's right.

REFEREE SMART: Fix the dates. The telephone call—you don't need to refer to that.

MR. VOSE: I'd be glad to have Mr. Ramsey here this afternoon to testify to his recollection concerning the date

of that phone call. He may not know the exact date, but he will know the chronology, whether it occurred before or after the payment. I think we had better let Mr. Ramsey testify. He was the one who received the phone call.

BY MR. VOSE:

Q. Do you have anything to refresh your recollection as to when that phone call was received? A. Yes. In looking at the Board's file, I find in there a statement from Mr. Ramsey that "Sometime during the latter part of December, 1948, I received a telephone call—

REFEREE SMART: That was after the payment had been made. You just answered in reply that it was before payment.

THE WITNESS: I said my impression was that it was before payment.

REFEREE SMART: You are reading now what you say refreshes your recollection. That says you are wrong. How can that refresh your recollection that it was before, when he said expressly it was late in December?

MR. VOSE: The date of the payment, at least when we were notified of it, was December 28. The latter part of December could easily be before that.

REFEREE SMART: What was the date you were in there, Mr. Shanahan?

THE WITNESS: It might be helpful to your Honor if I may read from Mr. Ramsey's statement, which will indicate from the context that this was before a settlement agreement was arrived at.

MR. SHANAHAN: The money was paid, your Honor, before December 18.

REFEREE SMART: That is what I understood.

MR. SHANAHAN: Because on December 18 I wrote Mr. Zack the letter enclosing the release and compliance order.

REFEREE SMART: That is what I understood.

MR. VOSE: I believe the document which you receive in evidence, your Honor, shows on the back thereof it was-

MR. SHANAHAN: If your Honor will note, the relea is dated the 9th day of December, the release itself, signe by Mr. Parr.

REFEREE SMART: It was paid before the 9th of D cember, if that is the date of the release.

MR. VOSE: If I may see it, please.

Yes, I call your Honor's attention to the date received December 28, 1948.

REFEREE SMART: What is this—stipulation.

MR. VOSE: Whenever the money was paid, we had n knowledge of it until the date set forth herein, and as understand, that particular document is an exhibit in th case.

MR. SHANAHAN: You are talking about a telephon call that preceded the payment of money, which telephon call Mr. Zack said was the latter part of December. Th money was paid December 9.

Furthermore, I don't know what you stamped, but thi release was sent December 18 from my office. I don't car what you stamped it, the day you received it. I know whe it left my office. You have my letter. When did you ge that?

MR. VOSE: Stamped December 28.

MR. SHANAHAN: The letter?

MR. VOSE: Yes.

MR. SHANAHAN: You better fix your stamps. There is the letter, December 18.

REFEREE SMART: Was it mailed?

MR. SHANAHAN: Yes, your Honor. I mailed it De- cember 18 and swore to it December 18. The money was paid December 9.

REFEREE SMART: All right.

BY MR. VOSE:

Q. Did you, Mr. Zack, at the time you had this conference which I think was about December 9— A. December 10.

Q. Was there anything said about the money already having been paid? A. Oh no.

Q. The whole discussion was on the basis of— A. A proffered settlement.

Q. A future act? A. That's right.

Q. At the time this phone call was transferred to Mr. Ramsey, was that also before we had any knowledge of it, that the money had been paid? A. That is my impression, yes.

MR. NATHANSON: A man can't testify to his impression.

THE WITNESS: That is my information.

REFEREE SMART: We will adjourn until two o'clock.

MR. NATHANSON: This won't last long. Maybe we can get through in a few minutes.

REFEREE SMART: Mr. Lepie has got to testify.

MR. VOSE: That is correct; we want both Mr. Lepie and Mr. Ramsey. And I would like to be heard about this point that I have mentioned so often, by way of argument, before we conclude—the binding effect of the determination by the Board.

MR. NATHANSON: According to that he may not be through this afternoon, so how about leaving it go till Friday?

MR. LEPIE: Mr. Referee, as far as any further continuance in this case is concerned, at the time that you granted a rehearing in this case which was in your office and which Mr. Friedman attended, you set this case down for a Friday, as I recall. It was on my suggestion on Friday this case may go more than one day and therefore should be placed on Monday, in case it goes on longer. Therefore I

think this case should be continued until concluded, without any further adjournments.

MR. NATHANSON: I will be frank with you, your Honor. I wanted to go the labor hearing at the State House and vote on some bills. There may be a few roll calls.

MR. VOSE: Counsel for Trustee is here. I think he is perfectly competent to carry on.

REFEREE SMART: We will adjourn until 2:30.

(Whereupon, the hearing was adjourned until 2:30 p.m.)

AFTERNOON SESSION

REFEREE SMART: The hearing will come to order. Do you have any cross examination of Mr. Zack that you want to make?

MR. FRIEDMAN: I will reserve the right of cross examination for Mr. Nathanson as soon as he gets back.

MR. VOSE: Mr. Lepie, will you take the stand, please.

JOSEPH LEPIE, a witness called by and on behalf of the National Labor Relations Board, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. VOSE:

Q. What is your full name? A. Joseph Lepie.

Q. Where are you employed? A. National Labor Relations Board, First Region, Boston, Massachusetts, as an attorney.

Q. Sometime in the latter part of 1948 were you assigned the handling of the compliance phases of the case of Hill Transportation Company and MacKenzie Coach Lines, Inc.? A. Prior to the latter part of 1948.

Q. In connection with the handling of the case, were you present at the conference in the early part of December, 1948, to which Mr. Zack has testified? A. I was.

Q. Will you tell the Referee what was said by the various parties at that conference, and who said it?

MR. FRIEDMAN: Is he going to repeat what Mr. Zack said, or what is it going to be—a repetition?

MR. VOSE: I intend it to be a repetition to get his entire version of what was had at that conference.

MR. FRIEDMAN: Are you interested in a repetition of what Mr. Zack already testified to?

REFEREE SMART: What I understand is that we will assume that he will corroborate Mr. Zack's testimony. Is that right, Mr. Lepie?

THE WITNESS: That is correct.

REFEREE SMART: Do you want to add anything to it?

THE WITNESS: I would like to add something to it.

REFEREE SMART: All right.

THE WITNESS: It was my understanding that during—

REFEREE SMART: It isn't your understanding. The question is what was said?

THE WITNESS: All right.

During the conversation, I told Mr. Shanahan that since the case was assigned to me I would like to go up to Manchester—that Mr. Shanahan and I should go up to Manchester, New Hampshire, and speak to the individuals that were discharged in the case, and also to the Union; that if the amount which the Union had informed us was the proper amount, and if they were satisfied with the settlement of the $500.00, then we would recommend approval of that to the Regional Director.

Mr. Shanahan, as I recall, stated that he was busy; and as I recall, I said I would like to go with him on Wednesday. My best recollection is that the conference took place

on Friday. He said that he was tied up on Wednesday, that maybe Mr. Robinson could go up there and drive me up. I declined the offer and informed Mr. Shanahan that I would get in touch with him just as soon as I was able to and to arrange a mutually convenient date for us to go to Manchester, New Hampshire.

After the conference was completed, I became engaged in an unfair labor practice case in the office, which was assigned to me.

REFEREE SMART: Are you through?

THE WITNESS: I have finished. I just wanted to add that.

REFEREE SMART: You have completed all the conversation?

THE WITNESS: That's right. That is the only additional thing that I wanted to offer.

BY MR. VOSE:

Q. And what is your recollection of the exact date on which this conference was held? A. My exact recollection was that it was on or about December 10, 1948.

Q. Have you checked a 1948 calendar to determine whether December 10 was a Friday? A. Well, as I recollect it, within two or three weeks after this conference I made a memorandum concerning what happened at this conference, and at that time the memorandum from which I refresh my memory showed that the conference was held on or about December 10, 1948.

REFEREE SMART: Have you got that memorandum?

THE WITNESS: The memorandum I believe is in the file.

MR. VOSE: The formal or informal file?

THE WITNESS: It is in the informal file.

REFEREE SMART: Where is that?

THE WITNESS: I don't have it with me.

REFEREE SMART: Who does have it?

MR. VOSE: I have this informal file here.

Is that it?

THE WITNESS: That is.

REFEREE SMART: Is that the memorandum you refer to?

THE WITNESS: That is the memorandum which I am referring to.

REFEREE SMART: And that is the memorandum from which you refreshed your recollection?

THE WITNESS: That is correct. I might correct my statement that I made before. I said within two or three weeks. I notice that the date of the memorandum is January 17, 1949.

MR. FRIEDMAN: Would you care to see it, your Honor?

I'd like to call your attention that the date was changed there. When it was changed I can't say, but I think you ought to note that.

REFEREE SMART: You mean the December 10?

MR. FRIEDMAN: From September.

REFEREE SMART: Obviously it was a typographical error.

MR. FRIEDMAN: I don't know. I am just calling it to your attention.

THE WITNESS: My recollection is that when I got the copy back from the girl who typed it, she had September instead of December, and I made her correct it.

REFEREE SMART: In view of this letter, would you say that if the Union had not deducted their dues, the case would now have been completed?

THE WITNESS: I would say that irrespective, the case would not have been closed out as far as I was concerned; I would not have recommended settlement on the basis of $500.00 on learning that the amount was substantially more than what the Union had represented.

REFEREE SMART: You say the difference between.

THE WITNESS: I said that the Union had informed us that in its opinion they believed there was approximately seven or eight hundred dollars due to the dischargees; and at the conference I did tell Mr. Shanahan—and I believe I showed Mr. Shanahan a letter to that effect from the Union—if that was the proper amount, and as Mr. Zack testified, I believe that I would have recommended the approval of the $500.00 settlement, but if I had gone to Manchester, New Hampshire, with Mr. Shanahan and at that time had ascertained that the amount was substantially greater than the $800.00, I would not have recommended any $500.00 settlement.

REFEREE SMART: Did you recommend it before you went to Manchester, New Hampshire, as Mr. Shanahan testified?

THE WITNESS: I did not. I did not recommend any settlement at that time.

REFEREE SMART: Did you tell Mr. Shanahan that if it was satisfactory to the men, that it was okay with the National Labor Relations Board?

THE WITNESS: I believe, as far as I was concerned, that I made the statement to Mr. Shanahan that if the amount was as stated by the Union to be approximately seven or eight hundred dollars, and if it was satisfactory to the employees, then I would recommend to Mr. Zack that the settlement be approved.

REFEREE SMART: In view of that letter—do you have that letter from the Union, that you refer to?

THE WITNESS: I believe there is a letter to that effect, as to the amounts outstanding.

REFEREE SMART: Let me see it.

MR. VOSE: Do you want to take this file, Mr. Lepie?

REFEREE SMART: Mr. Friedman?

MR. FRIEDMAN: I just want to discuss with Mr. Shanahan how the Union arrived at those figures.

MR. VOSE: Your Honor was referring to the letter from the Union.

REFEREE SMART: I am referring to the letter he is referring to, whatever it may be.

THE WITNESS: I am referring to letter contained in the file, dated May 7, 1948, addressed to myself by Basil D. French, Secretary-Treasurer, which states that certain amounts are due the employees.

REFEREE SMART: Is that it?

THE WITNESS: That is the letter.

MR. FRIEDMAN: Those were the figures that Mr. Lepie gave Mr. Shanahan.

MR. SHANAHAN: At our conference. It is in that letter.

REFEREE SMART: Then you did get the letter.

THE WITNESS: Yes, I received a letter from Secretary-Treasurer Basil French, telling me what, in his opinion, were the amounts he thought were due.

REFEREE SMART: He got it from the men, didn't he?

THE WITNESS: If the letter so states, I assume that he received it. But that of course is not binding upon us or wasn't binding upon myself, as far as this was concerned.

REFEREE SMART: What did it say: These above-named amounts are in accordance with decision.

What decision did he refer to?

THE WITNESS: I assume—and of course I am only speaking for him now—the decision in the National Labor Relations Board's case, the Board's order in the Hill and MacKenzie case.

REFEREE SMART: The Board's decision doesn't say how much is due.

THE WITNESS: That is correct.

REFEREE SMART: How can your answer be correct? The letter says, "These above named amounts are in accordance with the decision." He is referring to the amounts.

THE WITNESS: As I stated, I don't know what was in his mind at the time he wrote. I can't explain his words contained in the letter. But I understood it to mean that as far as the Union was concerned, that was the amount they believed due to the employees.

REFEREE SMART: He says the amount of money owed to Elwyn Bartlett was paid in full.

THE WITNESS: As far as payment to Elwyn Bartlett, at that time I was not handling the case.

MR. VOSE: You may examine.

MR. FRIEDMAN: I just want to reserve the right to interrogate.

REFEREE SMART: Why do you want to wait?

MR. FRIEDMAN: In case Mr. Nathanson wants to ask some questions. I have no questions.

REFEREE SMART: He hasn't heard the direct testimony.

MR. FRIEDMAN: In case he wants to question something he has said previously.

MR. VOSE: I have one more question I want to ask.

BY MR. VOSE:

Q. Mr. Nathanson, in his opening statement, asserted that they had fully cooperated with the Board,—

REFEREE SMART: Of course that is not evidence, what he said in his opening statement.

MR. VOSE: That is reassuring. It is a little bit hard, as these proceedings are so informal, to tell when counsel is testifying as to something that happened within his knowledge or presence, and when he is arguing.

BY MR. VOSE:

Q. Were you able to get access to the books of Hill

Transportation Company and MacKenzie Coach Lines, until the Referee more or less interceded at the last hearing? A. Well, after I had computed what I believed was the amount due and which I think is explained in the original proof of claim,—

REFEREE SMART: You were the man who computed it? I thought the man over there made the computations.

THE WITNESS: May I state that I originally computed the amount of back pay, and I'd like to explain.

REFEREE SMART: Tell me when you computed it.

THE WITNESS: I computed it shortly prior to filing proof of claim.

BY MR. VOSE:

Q. What is the date of the filing? A. I don't recall offhand. The record will show.

MR. VOSE: The records show that the proof of claim was filed in March, 1949.

REFEREE SMART: Shortly before that?

THE WITNESS: It was between that period—prior to March 1949, that I computed the back pay. The basis of my computation of the back pay was that I interviewed the individual dischargees and attempted to ascertain from them what their average earnings were per week for the three months prior to their discharge date. From that figure I took an average earning per week. I then multiplied their average earnings per week by the number of weeks that they had been discharged, up to the date of reinstatement. I then got the gross back pay due to the individual dischargees. From that I deducted all interim earnings, part of which I secured from Social Security in Baltimore, Maryland, and the part which was not recorded by Social Security I secured from the employees themselves.

And that is the basis of the computation that was filed by myself.

REFEREE SMART: You didn't go to the books of the Company?

THE WITNESS: I did not go to the books of the Company for the simple reason that, in discussing the matter with Mr. Nathanson as to back pay, his position was always that it didn't make any difference because the employees were never on the payroll of MacKenzie Coach Lines, but were employees of Hill Transportation. And my position to him was that as far as the Board order was concerned, that the Board order ran against both Hill Transportation and MacKenzie Coach Lines; and that is the position I believe I took before your Honor at the last hearing.

REFEREE SMART: Well, weren't you concerned with the truth of the matter, to find out whether they were in fact on the payroll of the bankrupt corporation or not?

THE WITNESS: I felt that I was bound by the Board's order and the Circuit Court decree establishing liability as against Hill and MacKenzie.

REFEREE SMART: Your position is that you have a technical claim; you don't care anything about the truth or justice or the fairness of the claim. Is that right?

THE WITNESS: I think the Board had decided that particular issue and I was guided by the Board decision, which is binding upon me; and the Board found these employees were both employees of Hill Transportation and MacKenzie, and that the Circuit Court of the United States, First Circuit, had affirmed that finding and therefore I was bound by the findings of the Court.

And I would like to state further, in answer to that—and I believe your Honor will bear me out—that at all times I was willing to sit down with the Trustee and his counsel, and if there were anything to be knocked off the total amounts due as I had figured them to be, I was willing to concede and compromise the amount.

REFEREE SMART: Why didn't you go to the books of the corporation to make your computation?

THE WITNESS: At no time did I have the books of the corporation. They were in the accountant's office.

REFEREE SMART: You could have gotten them.

THE WITNESS: I don't know whether I could or could not, except for the fact—

REFEREE SMART: Did you try?

THE WITNESS: I asked, I believe on one occasion, Mr. Nathanson, where I could see the books. He told me there was no sense in it because as far as his position was concerned these were employees of Hill and not MacKenzie; and that was the whole issue which he brought up before me on each occasion.

BY MR. VOSE:

Q. When did you first find out that this money had actually been paid, the $500.00, to the four claimants involved herein? A. I returned to my office after being out on a case, and found what I believed was a release and an affidavit of compliance.

Q. That is the recent affidavit that has been filed? A. That is right; that was in the latter part of December.

Q. When did you return to the office? A. I think it was during the latter part of December that I returned to the office and found in my basket the release and also the affidavit of compliance at that time. It was at that time that Mr. Ramsey told me that he had a call from Mr. Parr during my absence concerning the settlement of this case. He also told me what he had told Mr. Parr.

At that time I told him that I had found in my basket the affidavit of compliance and a release, upon which I called Mr. French, I believe, on the phone, but did not contact him because he was out. Subsequently I did contact him, and found out what had happened.

Q. Did you subsequent to that have any conversation with Mr. French about the payment that had been made? A. I believe I did speak to Mr. French, and he told me the $500.00 had been paid over; that a share of the $500.00 had been paid to the employees and that the Union had retained some monies due it from those employees.

Q. What did you say to him in that telephone conversation? A. I believe I told him that he should not have retained the monies, that he should have paid the entire amount over to the employees.

REFEREE SMART: Why did you tell him that?

THE WITNESS: Because I thought it was improper for him to deduct any of the monies due to the employees.

REFEREE SMART: Now let me ask you this question. If he had not deducted those dues, would you have made any further claim in this case?

THE WITNESS: Absolutely yes, because my subsequent investigation disclosed to me that there was not $700 or approximately $800, but approximately $6,000.00 due, and I never would have recommended a $500-settlement on the basis of approximately $6,000.00 back pay.

REFEREE SMART: Do you want to tell me that you were going to investigate it anyway, even if they hadn't deducted the dues?

THE WITNESS: Absolutely.

REFEREE SMART: What was the purpose of paying five hundred?

THE WITNESS: May I answer by saying that the purpose of my making arrangements to go to Manchester with Mr. Shanahan was for that specific purpose, to ascertain whether $700.00 was due or not; and had I go to Manchester, I would have ascertained that there was more than $700.00 due and I never would have recommended the $500-settlement.

REFEREE SMART: But if they hadn't deducted the dues, it would have gone through on the $500-settlement, wouldn't it?

THE WITNESS: Absolutely not, as far as I was concerned. It wouldn't have affected my recommendation one way or another.

REFEREE SMART: That isn't consistent at all. It isn't consistent with this letter either. This whole letter is written on the basis of those dues; otherwise it would have been approved by you, as Mr. Shanahan says it was approved by you. I don't think you are being fair with me; I don't think you are telling the truth as you should.

THE WITNESS: Your Honor, I cannot approve any settlement; the most I can do is make recommendations.

REFEREE SMART: I am not concerned with what you can do. I am concerned with what you did do as a matter of fact.

THE WITNESS: I did not approve any settlement.

BY MR. VOSE:

Q. That money was not paid over in the presence of anyone connected with the National Labor Relations Board, was it? A. As far as my knowledge is concerned, that is correct.

REFEREE SMART: Well, the way this case has been handled, it seems to me the National Labor Relations Board ought to have some different counsel here. I don't like this case at all. I can't understand an important government department, its attitude on this case at all, or the testimony.

MR. VOSE: You are entitled to your opinion, sir. I'd rather not make any response to that observation.

I would like to call Mr. Ramsey as my next witness.

MR. FRIEDMAN: I would like to bring out just a couple of things.

REFEREE SMART: You may cross examine.

Cross-Examination

BY MR. FRIEDMAN:

X-Q. Mr. Lepie, did you ever write a letter as to computing the amount you claim was due the employees? A. If my recollection serves me correctly, I don't believe I actually made any written demand.

X-Q. Isn't it a fact that Mr. Shanahan and myself made requests numerous times as to how you computed these amounts? A. That is correct, and I believe I answered and told you how I computed them.

X-Q. Have you anything in your files to show how you computed these computations? A. I believe there is.

X-Q. Will you check your files and see if you can find anything on that?

MR. VOSE: I wish to object on this for the same reason stated this morning, as to the computation.

MR. FRIEDMAN: If your Honor pleases, the Government is pretending to present a claim which indicates computations with reference to monies due these employees. I say I have a right to inquire, if it is an issue and it is before the Court, as to how they computed these figures. They can't blow hot and cold at the same time.

They say: Here is the proof; we won't tell you how we arrived at these figures.

We have objected to this claim, if your Honor please, and the burden is on them to prove how they computed these figures. It is their claim, not our claim. We have a right to object to it. They have a right to come in and show how they computed and arrived at these figures.

MR. VOSE: They merely objected by a simple denial. They haven't come forward with evidence.

REFEREE SMART: It is for you to establish your claim.

MR. VOSE: I think that as I understand the law—and I certainly make no claim to any great understanding of

it, but I have tried to look into this particular point—the Board's amended proof of claim is supplemented by your hearing upon which we are proceeding and constitutes a prima facie case, and until the objector comes forward with sufficient evidence concerning a matter which is within the competency of the tribunal to decide, we are not called upon to go further.

Besides, we get back to this basic objection of mine—and I don't think I have made it clear yet just how these things are normally computed in case after case. We are not doing anything unusual here. And if I may be permitted to describe it again, after a Board order is entered, which says make whole certain employees—it doesn't say pay them a certain amount. It necessarily can't, because until reinstatement offer is made we don't know the terminal date; it is still accumulating.

After a Board decision is entered and after a court decree, the parties sit down; they try to work it out. We couldn't sit down in this case, because the Trustee took the position that nothing whatever was due, that these people were not even the employees of the bankrupt. Now we just couldn't go through that normal procedure in this case because of the legal position taken by the Trustee.

REFEREE SMART: You mean after the Board had decreed that they were employees of the bankrupt corporation.

MR. VOSE: That is right.

We say it was incumbent upon them to sit down with us, let them show us if we have made a mistake; and if they can't iron it out that way, then the Trustee can request the Board to make a formal determination; that is a hearing before a Trial Examiner.

REFEREE SMART: Did they make that request?

MR. VOSE: No, they didn't make it.

REFEREE SMART: The conference of Mr. Shanahan and Mr. Lepie and Mr. Zack and the rest of them, wasn't that a sitting down, trying to reach an agreement?

MR. VOSE: They were then talking about a compromise on the basis of an assumed total amount of back pay due.

REFEREE SMART: Wasn't they sitting down together, around the conference table, in an effort to make an agreement that would comply with the order of the court?

MR. VOSE: Had the subsequent investigation—

REFEREE SMART: I am saying now, wasn't that what it was, the purpose of it?

MR. VOSE: At that time, yes. I won't say that they were derelict in their duty; but when we in January, as that letter which I read—

REFEREE SMART: Well, that is after they deducted their dues.

MR. VOSE: When we informed Mr. Shanahan—

REFEREE SMART: That is the one, isn't it?

MR. VOSE: That is not it, but it has been read into the record.

REFEREE SMART: Yes, I know.

MR. VOSE: Then it was incumbent upon them to attempt to reach an agreement.

But now this new issue is injected into it. The thing was settled. They wouldn't sit down to figure it out. We said it wasn't settled.

REFEREE SMART: They said it was settled.

MR. VOSE: That's right.

REFEREE SMART: That is when they sent in their compliance order.

MR. VOSE: Well, this all involves the basic issue before your Honor: Was it settled or not?

We say that the evidence—

REFEREE SMART: Isn't that the turning point of the case?

MR. VOSE: As far as your Honor is concerned, it is a very crucial point. You have the right to determine whether the evidence shows that the Board approved this

settlement. We think that the evidence falls short of that mark. And being of that view, we think it was incumbent upon them then to sit around the table and go over it and try to work it out.

Then they had two points: first, it is settled; second, they weren't employees anyway so there is no duty to sit down.

So now, if we can't agree, we say it is still not too late to send it back to the Board and let the Board formally resolve it. Mr. Jaworski will produce evidence based upon his investigation of the records of both companies; the Trustee will have the right to bring in whatever evidence he wishes. He can make any legal arguments he wants. And then the Board will hand down a decision, spelling out the amounts owed to each man.

REFEREE SMART: I think you are confusing the thing a little bit. Do you understand this is a bankruptcy case?

MR. VOSE: Yes, your Honor.

REFEREE SMART: And the Bankruptcy Court is a court of equity.

MR. VOSE: Yes, your Honor.

However, a court of equity, as we point out in our memorandum of law in support of our proof of claim, must give effect to applicable federal statutes.

REFEREE SMART: That is right; I agree on that.

MR. VOSE: And we say that if you give effect to the National Labor Relations Act and if you find, as we say the evidence warrants, that there wasn't a settlement,—

REFEREE SMART: Let me ask you this question.

Do you think that we'd be here at all today if they hadn't deducted those dues?

MR. VOSE: Your Honor, I honestly don't—

REFEREE SMART: You don't think so, and I don't either.

MR. VOSE: No, your are misunderstanding me. They wouldn't have approved the settlement, regardless. They were going on a false assumption. Of course, they thought that the Union man who went up there and theoretically investigated was not making such a terrific concession.

REFEREE SMART: Who would know best, the men who worked, themselves, or somebody down in Washington? The laborers themselves estimated $800.00.

MR. VOSE: All we know from the record in this case is that the Union official reported this amount as due. We don't even know how he got it.

REFEREE SMART: Mr. Shanahan said he talked with the men.

MR. VOSE: All right. Subsequently, our Mr. Lepie talked with the men.

REFEREE SMART: And I suppose he told them: You have settled for $500.00 and I can get you five, six thousand; you were a fool to settle.

MR. VOSE: I don't really think that is a wholly warranted assumption.

REFEREE SMART: Sounds all right to me. I can imagine what he said.

MR. VOSE: He for the first time found out what the facts were. He assumed that they had gotten a good paying job.

REFEREE SMART: He had to do it. Regardless whether they worked for the bankrupt or not, he got a decree saying they did. He is standing on that, regardless of the truth or justice of it. He is standing on a technicality.

MR. VOSE: Your Honor, on that point I would like to point out that the attorney, I believe, for the Trustee was in court, in the Circuit Court of Appeals here in Boston when the question of the enforceability of this order came up.

REFEREE SMART: Nobody questions the enforceability of the order.

MR. VOSE: All right.

This order said because of the interrelation of these two companies and the fact they were switched back and forth on the payrolls, and that they had substantially identity of top in both companies, and worked for one company one week and another the next week,—

REFEREE SMART: That isn't the fact.

MR. VOSE: I am reciting what the Board found. The Board found upon those facts.

REFEREE SMART: Where did they get that evidence?

MR. VOSE: At a hearing before the Trial Examiner, in which the predecessor of the Trustee was questioned; not any of the attorneys involved in this particular hearing, but they were represented by counsel. They had an opportunity to except to this finding.

REFEREE SMART: When was this trial examination?

MR. VOSE: That Trial Examiner's intermediate report came down April 14, 1947.

REFEREE SMART: Forty-seven?

MR. VOSE: Forty-seven.

And that intermediate report—

REFEREE SMART: When was it these fellows were discharged?

MR. FRIEDMAN: March of 1946.

MR. VOSE: This came down in April of 1947, and said that because of the interrelation of these two companies, MacKenzie should be made to reinstate them with back pay just as well as Hill. MacKenzie didn't even enter an objection.

REFEREE SMART: Who represented MacKenzie at that hearing?

THE WITNESS: May I state the record shows a firm of Hughes & Burns, from Dover, New Hampshire.

MR. FRIEDMAN: The same counsel represented both, I believe.

MR. VOSE: At the hearing before the Trial Examiner was the first opportunity which Hill and MacKenzie had to disprove the fact that these employees were employees of both, really. Looking at it for practical purposes, having failed to except to this particular finding, it perhaps was foreclosed in the Circuit Court of Appeals from raising objection; because the Act states that objections not raised before the Board may not be raised before the Court in the absence of extraordinary circumstances.

But here you have this Board finding to which MacKenzie didn't except; no objection made in the Circuit Court of Appeals. Mr. Friedman, I believe, was present in the Court of Appeals.

REFEREE SMART: Of course, MacKenzie Coach Lines is bound by this decree of the Circuit Court as being its employees; no question about that.

Do you think there is?

MR. FRIEDMAN: I probably think so. The decree is mainly for the purpose of enforcing reinstatement, etc., but MacKenzie Coach Lines was out of business at that time. It didn't make any difference to the Trustee in Bankruptcy, in our opinion, whether it was affirmed or not, because it was out of business.

REFEREE SMART: I know, but your defense that they weren't employees of MacKenzie Coach has been foreclosed.

MR. FRIEDMAN: Wait a minute now, your Honor. There is no evidence in here, nor Board evidence, to show these four men were employees of MacKenzie. It may be so in general, but it was never proven these four men were employees of MacKenzie Coach Lines.

REFEREE SMART: Doesn't the Circuit Court decree determine that?

MR. FRIEDMAN: I don't believe so.

MR. SHANAHAN: It doesn't mention these four men.

REFEREE SMART: No, it doesn't mention them. I see. Your argument is that that decree doesn't mention—

MR. FRIEDMAN: —that these very four men were the employees of MacKenzie. They want to start bringing in general conclusions of the Board, which has no bearing on these four employees; that is something else.

MR. VOSE: May I read this excerpt from the intermediate report, which deals with this question?

REFEREE SMART: Yes.

MR. VOSE: "It has been found that Respondents have discriminated with regard to the hire and tenure of employment of the individuals whose names appear in the Appendix A attached hereto."

REFEREE SMART: Who are those names?

MR. VOSE: The names appearing in Appendix A, which is attached to the Board decision, a certified copy of which is included in our amended proof of claim, are:

Elwyn Bartlett—he is not involved at the present time under Board's proof of claim.

REFEREE SMART: Has he been paid?

MR. VOSE: I don't know whether he has been paid, but we are not claiming it at this particular stage of the game.

Alkernon Nichols, one of the four; Robert Varney, another; Harold Bartlett; C. R. Bunn; and Gerry Kimball.

Those are all of the ones involved herein.

Now if I may go back.

REFEREE SMART: Yes.

MR. VOSE: "I just mentioned individuals whose names appear in Appendix A. While as of the date of the discharges all but Elwyn Bartlett were carried on the payroll of Hill, due to the close interrelationship existing between the operations of Hill and MacKenzie, their maintenance

of one joint repair shop, the shifting of employees from the payroll of one to the other without the employees' consent or knowledge, and the exercise by Hill and MacKenzie of the prerogatives of management with respect to the employees of either corporation, the undersigned believes it necessary, in order to effectuate the policies of the Act, that both Respondents be joined in the remedial order."

That is the finding to which they did not except and which we say determines the issue of employment.

REFEREE SMART: It seems to me it does. It seems to me that determines the fact that they were employed by MacKenzie.

Don't you think I am bound by that?

MR. FRIEDMAN: I am not so sure about that, your Honor.

REFEREE SMART: No, but that is the report that went to the Circuit Court on which the decree of enforcement was based, and it lists those four names. That is the res judicata.

MR. SHANAHAN: I can't get into this because I am not counsel.

REFEREE SMART: Yes you may.

MR. SHANAHAN: Well, there are other employees there. These four men never worked for MacKenzie—never, from the time they started to work.

REFEREE SMART: It was up to Messrs. Burns & Hughes of Dover, New Hampshire, to prove that, wasn't it?

MR. SHANAHAN: That may be; but that is the fact. That was a labor dispute, your Honor, involving two firms that occupied the same garage, and the National Labor Relations Board made its decision. They were not asked to find whose employees they were, as your Honor has before you, because if they did they'd have gone to the books. They have been over the books. They have been over MacKenzie's books; they have been over Hill's books.

REFEREE SMART: Whom do you mean by "they"?

MR. SHANAHAN: The counsel of the National Labor Relations Board. They know that these four—he is right here in court; I have forgotten his name. He examined our books.

REFEREE SMART: Who is it? When did he get that information?

MR. SHANAHAN: He had the Hill books about ten days ago—went all over the Hill books. And he has been over the MacKenzie books, I am told.

These four men never worked for MacKenzie. MacKenzie never paid them five cents, never withheld a tax on them; and it is certainly beyond the power of the National Labor Relations Board to find that four men who worked for Hill are in fact employees of MacKenzie so far as a debt is concerned. That is your problem. So far as labor relations go, yes, they might well take that view; but so far as the debt goes, MacKenzie doesn't owe these four men a dime. They never did. They never worked for them.

REFEREE SMART: Do the books show that?

MR. SHANAHAN: Yes, your Honor. Their man is right here. Forget ours; we have the Hill books here. They have been over the MacKenzie books. The MacKenzie books show these four men never worked for MacKenzie; they worked for Hill. That is why I went up and settled, because it was my headache; it wasn't the bankrupt's; it had nothing to do with Mr. Nathanson.

REFEREE SMART: What do you say to that?

MR. VOSE: Your Honor, I say that to give effect to his contention is to disregard the order of the Board, which tells both companies specifically to put all of these men back and to make them whole; and that if you are going to accept his contention,—

REFEREE SMART: Isn't the Board order more of a mandatory injunction, so to speak, to the management of the corporation, to reinstate these men?

MR. VOSE: Well, it is that, certainly.

REFEREE SMART: And to bargain, and not interfere with the policies of the Union, and incidentally to pay them what you owe them?

MR. VOSE: I think that is quite an important part of the order. It is not only put in there to reimburse these men, but to reassure all of the other employees.

REFEREE SMART: Do you think the order of the National Labor Relations Board, such as they entered here, creates a debt against MacKenzie?

MR. VOSE: Yes indeed, your Honor.

MR. SHANAHAN: For whom they never worked. Now that is a fact. You know it is a fact.

REFEREE SMART: How can I, as a Referee in Bankruptcy, say that if the evidence before me shows that they never worked for MacKenzie?

Your theory is res judicata by decree of the Circuit Court?

MR. VOSE: I just can't see any alternative to that, yes.

REFEREE SMART: That is your position?

MR. VOSE: Yes. I say the Board had that squarely before it. They found that this MacKenzie Coach Lines, Inc., should reinstate them and make them whole; and that the only place that finding can be attacked is in the Court of Appeals. Of course they have to first attack it in the Circuit Court. They didn't even attack it there. We say it is foreclosed now.

It is all right for Mr. Shanahan—I understand his desire to get this in; but that was the job of the attorney representing MacKenzie in the original hearing before the Board. We get summary enforcement in this case, an unusual thing, without the full dress briefing, because they have

failed to object; and we say that that Court decree affirming the Board's finding—

REFEREE SMART: Do you think it equitable for these employees to get six, seven thousand dollars more money?

MR. VOSE: I certainly do.

REFEREE SMART: Out of this bankrupt estate?

MR. VOSE: We don't know what was told them by the Union as to their possibilities of collecting. They weren't told that the Board takes the position that this is a priority claim.

REFEREE SMART: Did you ever know a labor union that didn't get all it could for its men?

MR. VOSE: Generally speaking, they do a pretty good job on behalf of their men; but that is what puzzles me about this case. I have never seen a case in which the Union representative apparently was willing to settle for so much less than the face amount; and I believe he was just ill advised as to the rights of the men. I don't believe he even had a proper computation as to what they would have earned with the Company. They may have accepted the representations of a Company official as to the number of weeks they would have worked,—there is a disagreement about that—which just wouldn't inform them as to just how much they were really entitled to; and that you just can't say, when they make up their mind on misinformation, that it is inequitable to give them the fair amount.

REFEREE SMART: You put on information to show that they are employees of the bankrupt corporation.

MR. VOSE: Your Honor, I prefer to stand upon my position that that matter has been determined by the Board order, as affirmed by the Court of Appeals. And as a matter of law, we say that this tribunal is bound by that prior determination. Hence, I do not propose to offer any evidence on that issue.

REFEREE SMART: All right. Go ahead.

BY MR. FRIEDMAN:

X-Q. Mr. Lepie, did you make any attempt to make your computation from any books and records of either the Hill or the MacKenzie Companies? A. No, I did not. May I qualify that?

X-Q. No; you answered the question. You are a lawyer. Didn't you think it was important to go to the original records of these companies, in making your determination how much was due these employees? A. That is correct.

X-Q. But you didn't see fit to do it? A. I asked Mr. Nathanson whether or not he would sit down with me and attempt to compute—

MR. NATHANSON: Let's not confuse the question, now.

MR. VOSE: Let the witness finish.

BY MR. FRIEDMAN:

X-Q. Don't you know, as an attorney, that the best evidence is to go to the records of the employers for information relating to employees' wages? A. I can't answer your question with a yes or no. I must make an explanation to your question, and if I am permitted to make the explanation I will try to answer.

X-Q. I want a yes or no answer. I think it is a very simple question.

As an attorney, I said, don't you know that the best evidence of obtaining information with reference to employees' wages is from the employers' books? A. It may be in some cases; it may not be so in other cases, from my experience.

X-Q. Isn't that the best evidence? A. It might very well be, and it might not be, in accordance with my experience.

X-Q. Where else would you find information with respect to wages of employees, or monies payable to them? A. Social Security, Baltimore, Maryland.

X-Q. And where is information ordinarily obtained in securing Social Security records on wages? A. I don't know what information employers use in obtaining it. I imagine they take it from their books.

REFEREE SMART: Obviously. Why would the information from Baltimore be as good as or better than the books from which those records are made?

THE WITNESS: Because I had originally ascertained, from Mr. Jaworski in his computations, that figures I got from Social Security do not correspond with figures which he saw on the Company's records.

REFEREE SMART: Which records are you referring to now? You said "Company".

THE WITNESS: I am not sure right now whether it was Hill or MacKenzie; but I knew that there was an inconsistency between what Social Security had sent me as their earnings, and what he had ascertained when I spoke to him about it—which was last Thursday or Friday.

MR. VOSE: I ask that the response to that question be stricken on the grounds that it is irrelevant to the inquiry of this Court.

MR. FRIEDMAN: This is cross examination.

REFEREE SMART: It may stand.

MR. FRIEDMAN: I think that is all, your Honor.

Redirect Examination

BY MR. VOSE:

Q. At the times you talked with Mr. Nathanson about computing back pay, what position did he take? A. His position was substantially that, as far as MacKenzie Coach Lines was concerned, these employees were never employees of MacKenzie Coach Lines and therefore it was not necessary to look at their books and records; that they always had been employees of Hill Transportation.

REFEREE SMART: Where did the $500.00 come from, to pay those men?

MR. SHANAHAN: From the Hill Company, your Honor.

MR. VOSE: I have no further questions.

(Witness excused.)

THOMAS H. RAMSEY, a witness called by and on behalf of the National Labor Relations Board, being duly sworn, was examined and testified as follows:

Direct Examination

BY MR. VOSE:

Q. What is your full name, please? A. Thomas H. Ramsey.

Q. Where are you employed? A. I am employed by the National Labor Relations Board, First Region, Boston, Massachusetts.

Q. Have you had any official connection with the Hill Transportation-MacKenzie Coach Lines case? A. No, sir.

Q. At any time during the latter part of 1948, did you receive a phone call in connection with the case? A. I did, sir.

REFEREE SMART: When was it? Fix the date, and tell me how you fix it.

THE WITNESS: I have no independent recollection as to just when this telephone conversation was had. By reference to the file I fixed the date as sometime in December, 1948. It was during the period when the Union was discussing settlement with the Company representative, and at the time no settlement had been effected.

BY MR. VOSE:

Q. What were the circumstances of your receiving this call? A. I was sitting at my desk, minding my own busi-

ness, and I got a call from the telephone operator. She said that Mr. Parr had tried to reach Mr. Zack, I believe, and Mr. Lepie; they were both out of town, and would I speak to him. So I said yes; and I spoke to him.

Q. What did he say to you on that occasion, over the telephone? A. Mr. Parr told me that the companies involved here were in financial difficulty, and that he had been having a series of discussions with counsel for the companies in the hope that they might be able to salvage something for the dischargees, and he thought the possibilities of effecting a compromise settlement were excellent. His specific question to me was whether or not, if he, as a Union representative, and counsel for the Company did enter into a compromise settlement agreement, that would bar the National Labor Relations Board from taking further action in this case?

Q. To what case are you referring? A. To me he was talking about the National Labor Relations Board taking further action in enforcement of its order.

Q. What did you tell him? A. I told him that the National Labor Relations Board would give absolutely no effect to any compromise settlement agreement that was entered into by the Union and the Company to which it, the National Labor Relations Board, was not a party.

Q. Did he say anything further on that occasion? A. No; as I recall, I think the conversation terminated with his stating that it was rather a sorry situation in that he was hopeful of getting some money out of it.

MR. VOSE: You may examine.

Cross-Examination

BY MR. FRIEDMAN:

X-Q. Were these conversations relative to the MacKenzie Coach Lines matter? A. He treated it as one case, sir. He mentioned the name of the case, as I recall.

X-Q. Did you say that you talked with counsel for these companies? A. Oh no, sir.

X-Q. Or Mr. Parr? A. No; my recollection of it is that he was talking—he may have said counsel, he may have said a representative of the Company; but he had been talking with somebody connected with the companies in regard to effecting a compromise agreement.

X-Q. Is it a common practice in your office to give decisions or opinions with reference to cases that are pending, with which you have no direct connection? A. I wouldn't give such an opinion.

X-Q. And you weren't connected with this case at all, were you? A. No.

X-Q. But you saw fit to render an opinion. Is that the idea? A. As to a general principle. He asked me a general question which I answered. I don't care about MacKenzie.

REFEREE SMART: Mr. Ramsey, had you heard about it?

MR. RAMSEY: I had heard about it because the case had been tried in the office, so I naturally know, for example, that my colleague is trying the Hill case.

REFEREE SMART: But you didn't know what was going on with reference to settlement?

THE WITNESS: No, I know nothing about that phase of it. As I say, I was just sitting there minding my own business.

REFEREE SMART: All right.

MR. VOSE: Is that standard procedure for the Board, in reference to settlements?

THE WITNESS: Certainly. That is a fundamental principle. That is why I was so quick to give my opinion.

MR. VOSE: That is all I have, sir.

REFEREE SMART: You may go.

(Witness excused.)

REFEREE SMART: Do you have any further evidence?

MR. VOSE: I have no further witnesses, your Honor.

REFEREE SMART: Any further evidence?

MR. VOSE: No, sir.

REFEREE SMART: Do you propose to put in some evidence as to how much is owed and how much is owed for three months up to $600.00, your pending priority? I don't want to foreclose your rights, but this is a proof of claim and you are supposed to have some evidence supporting your claim of $600.00 within three months of bankruptcy. There is no evidence yet.

MR. VOSE: With respect to that, that really as a practical matter is not an issue, because neither of these companies was operating during that period; so that unless this claim is given a Section 64(a)(5) priority—

REFEREE SMART: As a debt owing the United States Government?

MR. VOSE: That's right. —it is out as a prior claim, and for that reason I don't think any useful purpose would be—well, there isn't any evidence I can put in.

REFEREE SMART: Aren't you going to put in some evidence as to the amount of the claim?

I don't want to trap you into anything, you understand.

MR. VOSE: With respect to your question, your Honor, I appreciate your giving me this opportunity to consider that very thoroughly, what position I want to take. And after considering it, I have concluded that I should stand by my position that this is a matter to be determined by the Board in further proceedings, if necessary, and not before the Referee. And for that reason I decline your offer to put in this evidence as a witness of mine.

REFEREE SMART: I think you are making a mistake.

MR. VOSE: I have no objection to your Honor examining Mr. Jaworski.

REFEREE SMART: No; but this is a hearing. You come in here with a proof of claim, claiming so much money. You have got to support that with evidence.

MR. VOSE: I appreciate your Honor reminding me of that again.

REFEREE SMART: You are not confused, now. If the Board had already decided it and the Circuit Court had approved of the amount, I could see your position.

MR. VOSE: That is just what we say should happen.

REFEREE SMART: But as I understand, the Board has made no amount.

MR. VOSE: And the reason it hasn't made any amount is that because of the position of the Trustee that nothing was due because they weren't employees of the bankrupt—

REFEREE SMART: All right. Any more evidence?

MR. NATHANSON: No, your Honor.

REFEREE SMART: Well, I will tell both sides what I would like. I want each of you to file a request for findings of fact. I'd like to have each side write out what you think I should find as the facts, on the evidence that has been introduced. And I would like also a brief on the law involved.

MR. NATHANSON: Your Honor, I am not going to argue any law.

REFEREE SMART: I will listen to you now, argue the facts of the law.

MR. NATHANSON: Since we are going to do that,—

REFEREE SMART: Just a minute. It is understood, now, that the evidence is closed?

MR. NATHANSON: Exactly.

MR. VOSE: Your Honor, may we think about it another moment? May we have a recess for five minutes?

REFEREE SMART: Certainly. We will take a recess.

(Brief recess taken.)

REFEREE SMART: All right, proceed.

MR. NATHANSON: Your Honor, I understand Mr. Vose wants to make a statement. But it has been called to my attention that a statement was made about me while I was out, about my lack of cooperation—something like that, and I want to make it clear.

After we left the last meeting here—the first hearing, I said to Mr. Friedman here, and the accountant, "Turn over everything you have; show them what we have. And we will get the Hill books, contact him; show them everything we have. We don't owe them anything."

So the next time I hear about it is when we get a long brief from Washington, all of which is based on that one point, as to whose employees they are.

I immediately wrote a letter to you, and sent a letter to Mr. Somers, saying that is not the only issue—there are other issues.

This has been going right along, trying something—

REFEREE SMART: With whom did you correspond? With you, Mr. Vose?

MR. VOSE: You corresponded with me mostly; with Mr. Somers at the very beginning.

MR. NATHANSON: Subsequently I get back it was intimated on that brief—on that one brief—as to whose employees these people are. So I immediately sent a letter to you and sent a copy to Mr. Somers, stating that wasn't the only issue, other issues were taken up here and were involved in the case.

I am sorry if any statement was made here which is a matter of record in the letter I wrote to you back several weeks ago, in reply to that brief that that was the only issue. I wanted to state that.

Now I also want—in case this letter isn't in evidence—I just want to read it. In case this letter isn't in evidence, I want to recall to your Honor—

REFEREE SMART: Is there a copy of that letter?

MR. VOSE: We actually don't have a physical copy of it.

MR. NATHANSON: I will read it.

MR. VOSE: I think that a better way of handling it—

MR. NATHANSON: Wait a minute.

Part of the practice in this Court—any court practice—is when a letter is used and opposing counsel wants to see it, it is shown to anybody. While it is only a technical matter, if anybody wants to be petty, that is a rule of the Court.

MR. ZACK: I object to his reading it, nevertheless.

MR. VOSE: Your Honor, it is part of the Government's official confidential files; and because we want to cooperate with you and the Trustee, we have let you examine it and we have no objection to its going in, but just to preserve our point, may I read that into the record?

MR. NATHANSON: May I say Mr. Lepie already testified to it, I have been informed, and so it is a matter of record.

REFEREE SMART: It is a matter of taking the file.

Go ahead; read it.

MR. VOSE: On the letterhead of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 633, Manchester, New Hampshire.

If counsel has no objection, I will leave out this other stuff here. The date is May 7, 1948.

"Mr. Joseph Lepie,
Attorney, National Labor Relations Board,
24 School Street,
Boston 8, Mass.

Re: Hill Transportation Company and MacKenzie Coach Lines, Inc., Case No. 1-C-2823.

"Dear Sir:

I have been unable to get in contact with Mr. Gerald

Robinson, Mgr., in reference to making settlement in the amount of:

$245.60 owed to Harold Bartlett
$194.00 " " Gerry Kimball
$125.00 " " Alkernon Nichols
$210.15 " " Robert Varney.

These above named amounts are in accordance with the decision.

The amount of money owed to Elwyn Bartlett was paid in full according to word received. Mr. Robinson did talk with our Mr. Harry Parr, President and Business Agent, this morning (5-6-48) at Hampton, N.H., and was informed that these companies were now in the hands of Daniel McGillicuddy, 5 Arlington Terrace, Malden, Mass., as Receiver in Bankruptcy.

As this is all the information that I have been able to gather, I trust that something can be done to bring about a final settlement of this case.

Thanking you for your past interest, I remain

Yours very truly,
BASIL D. FRENCH
Basil D. French,
Sec.-Treas."

That is the end of the letter.

MR. NATHANSON: Now your Honor, I am not going to take much time. I am going to submit a memorandum—

REFEREE SMART: When you prepare your request for findings, I want you to sit down with Mr. Shanahan, because he has the thing chronologically in mind better than you, if I may say so.

MR. NATHANSON: Very well. I agree with you there. So I am not going over the facts.

REFEREE SMART: I understand the evidence is now closed. Is that right, Mr. Vose?

MR. VOSE: I would like to make a statement about the closing of the record with respect to evidence, because your Honor has generously given me time to consider what position we should take on this point and we have done so; and while we do not wish to offer any evidence, we do wish to state for the record that if the Referee will defer ruling on this matter until a Trial Examiner of the Board has had an opportunity to conduct a hearing for the purpose of resolving these disputed issues which we think should only be resolved before the Board, then we will see to it that a proceeding to resolve these matters is commenced forthwith and it will culminate, after both sides have had their say and legal arguments, in a decision of the Board.

REFEREE SMART: I am not going to hold this case any longer. I am going to decide this case on this hearing. You have a chance to put in your evidence now.

MR. VOSE: I appreciate your giving me this opportunity. We suggest an alternative: that we will conduct a proceeding immediately. We think that is where the proceeding ought to be conducted. It will result in a specific order of the Board. If the employer, MacKenzie, has any objection to the Board's findings, they can be thrashed out in the Court of Appeals.

REFEREE SMART: You are not familiar with this Bankruptcy Court practice. You come in with proof of claims, make certain allegations that so much money is due the United States Government, and you offer no proof whatsoever as to the amount.

MR. VOSE: Your Honor, it is our position that our proof of claim, unless it is challenged by something specific —some testimony that with respect to the given pay period there weren't these people on the payroll, they haven't met their burden.

But apart from that, I can't get into that without conceding that you have the power to pass upon something

which, as is already too well known, I am taking a contrary position on.

REFEREE SMART: You have no formal evidence to submit? That is what I want to know.

MR. VOSE: That is correct, your Honor.

REFEREE SMART: All right. Go ahead with your arguments.

MR. NATHANSON: Since he started, do you want to argue, Mr. Vose?

MR. VOSE: Yes, I would like to.

MR. NATHANSON: Go right ahead.

REFEREE SMART: You are through with the evidence, I understand?

MR. NATHANSON: I am through with evidence. I asked him if he wants to argue.

Go ahead.

REFEREE SMART: Well, give him time.

MR. NATHANSON: All right.

MR. VOSE: I appreciate your indulgence.

The basic point in this case, as it has now shaped up, is the question of whether this tribunal or the National Labor Relations Board has the authority to pass upon these back pay computations. The Trustee says this Court has full power to pass upon them. In so contending he, I think, wholly overlooks the fact that Congress, in enacting the National Labor Relations Act, made the Board the sole judge of matters properly within its jurisdiction, just as Congress made the Bankruptcy Court the sole judge of things properly coming within the bankruptcy sphere.

I have cited numerous decisions in my petition for rehearing, upholding the exclusive authority of the Board to pass upon unfair labor practices and to make the proper remedial orders. These decisions—and I know I am repeating, but this is the crucial or at least one of the crucial issues as far as we are concerned—these decisions make

it abundantly clear that Board decisions can only be disturbed in the way which is prescribed in the National Labor Relations Act.

REFEREE SMART: Doesn't that apply, Mr. Vose—excuse me for interrupting—as between the parties?

MR. VOSE: I think it goes further, if I may be permitted to develop it.

REFEREE SMART: All right.

MR. VOSE: Maybe I can show you. Even as regards bankruptcy matters, the Board's findings can only be overturned in the manner provided in the Act: in the Circuit Court of Appeals, that is.

We recognize that a problem arises where you have two tribunals, each exclusive in its own sphere; but their spheres sort of overlap, as they do in this case. And that is the way I view this situation.

Now, the Bankruptcy Court has the exclusive jurisdiction to determine questions within its sphere, and so does the Labor Board, but here they kind of overlap. And we say where there is this overlapping, there has to be some accommodation between one statute and the other. In other words, there must be a harmonizing so that the purposes of both statutes are furthered. Unless you have some kind of harmonizing like that, a wholly unworkable situation results.

For example, we could go to the Circuit Court of Appeals and say, "Look here, you have an order entered against MacKenzie Coach Lines—entered with counsel for the Coach Lines, or at least counsel for the Trustee in Bankruptcy, in court. He hasn't done anything to comply with that order. He takes the position that he is not bound by this determination that they are employees." And we could ask he be adjudicated in contempt.

But we don't say that is the proper solution to this problem. We say that each must yield a little bit of its exclusive

authority and that the Board should be permitted to pass upon matters of unfair labor practices, the computation of back pay; and that the Bankruptcy Court should pass upon matters traditionally within its sphere, such as provability of its claim, the priority to which it is entitled.

Now that is why we have submitted to the jurisdiction of the Bankruptcy Court and consented to your determining these questions, because we can see that we both can't act as though we are the only person in the world to operate without any regard to the other tribunal.

That is the situation. I say that an accommodation has to be made, some yielding, and the yielding should deal with the computation of back pay in this case because, as we have pointed out in our many memoranda to which my brother has referred, we say that computation is a matter which has traditionally been left to the Board and that the Board is the expert tribunal to pass upon that.

We are going to give the Trustee, if you permit us to hold this further hearing—since apparently we can't get together around a table and do it—we are going to give him a fair deal. We want to hear what he has to say. We haven't been able to hear it up to now because he was relying on these legal decisions which we say he is not entitled to rely on.

And that concludes my remarks, your Honor.

REFEREE SMART: Do I understand—see if I am right. I don't know much about labor regulations, but as I understand, the purpose of the National Labor Relations Act is to further the labor relationships between labor and management; and that while ordinarily they would approve of whatever the Union did, if the Labor Board as a whole thought that the Union's requests were not in furtherance of the labor policy of the Government, they wouldn't be corroborated; if they were, they would be.

In other words, the purpose of it is to further the economic conditions of the labor market. Isn't that it, as a whole?

MR. VOSE: I don't think it can quite be generalized that way. We are interested basically in furthering collective bargaining.

REFEREE SMART: Yes, for that reason. I mean, determining what back pay is due is a very incidental part of the National Labor Relations Board.

MR. VOSE: Yes, but if we let that determination be handled by some outside party who isn't fully cognizant of all the considerations that should be taken account of, we are abdicating.

REFEREE SMART: Yes, but the bankruptcy was back in 1948; and when was the first proof of claim filed?

MR. VOSE: March of 1949.

REFEREE SMART: It is now past March of 1950. It's been over a year.

MR. VOSE: Let me explain. We have all along wanted to sit down and compute. But that is why we haven't been able to compute; they were relying on legal positions that led to the conclusion that nothing was due.

REFEREE SMART: Do you understand, Mr. Vose, in an ordinary bankruptcy case—say a manufacturer has a claim against a bankrupt. He files a claim under oath. He says: The bankrupt owes me $700 for goods sold, dated so and so, total $700. Now, if that proof of claim is contested, he has to come in and support his allegations with his books of account and testimony as to the dates and as to the amounts due. If he doesn't do that, his proof of claim is disallowed.

That is the ordinary case.

MR. VOSE: I appreciate your questioning me about that.

REFEREE SMART: Now you come into court with a proof of claim, and amended proof of claim, with so many X-thousands of dollars. You submit no evidence whatsoever in support thereof as to the amount.

MR. VOSE: The claim speaks for itself, as far as we are concerned.

REFEREE SMART: The claim is not evidence.

MR. VOSE: Well, the claim, as I understand it, is taken as prima facie evidence of the facts therein recited and is sufficient unless the objector comes forward with sufficient evidence to overcome the prima facie case made by the Board's claim; in which event, it is incumbent upon the claimant to adduce evidence in support of that. But if he does come forward with that, it is our position—

REFEREE SMART: As I understand it—perhaps I am wrong now—as I understand, if the Trustee objects to proof of claim, the burden is on the claimant to prove his claim.

I may be wrong.

MR. VOSE: May I submit a memorandum on that?

REFEREE SMART: Oh yes.

MR. VOSE: I may be wrong too, your Honor. I have been trying to read Collier's frantically to find out what the law is, and I may have misinformed myself. I'd like to be able to submit something on that point.

But I would say that if he does come forward with specific evidence challenging our findings with respect to the number of weeks or to the earnings in any week, or some specific evidence of that kind, then the claim must be regarded as unliquidated. Now, the Bankruptcy Act permits filing of unliquidated claims, and we say claim should be liquidated by the National Labor Relations Board.

MR. NATHANSON: Mr. Referee, I intend to take five minutes by the clock, and no more.

REFEREE SMART: All right, go ahead.

MR. NATHANSON: In summarizing our case, Mr. Shanahan explained to you the fact, and I am not going to review the facts.

I want to say one thing about these administrative boards. The trouble with the general process of the administrative board—any administrative board—is to take things unto itself. Of course, it is for the Legislature, the Congress, to set limits, and for the courts to determine what the limits are.

In this particular case, the National Labor Relations Board takes a position—may I say almost a case of first impression. There have been many briefs filed, but none of them in point.

You said one thing a minute ago—and which is what David I. Walsh said fifteen years ago—when you said, "Isn't the purpose of the National Labor Relations Board to get the people together?" And David I. Walsh at that time said that the purpose of the Walsh-Healey Act was to get the laborer and the employer together, take them in a room and say, "Now boys, get together."

And Professors Cox and Dunlop of Harvard, in writing an article about that two or three months ago, from which I tried to get some knowledge by analogy, when I called it to the attention of Brother Lepie, he said, "Well, those boys, they don't know anything." They know nothing. Well, nobody knows anything.

Let's see what happens here. Under the theory of this Board, when they give a decree that somebody shall pay let's say a sum of money, or something else,—

REFEREE SMART: They have made no such decree.

MR. NATHANSON: I know.

Suppose, under their theory of this case, you actually went and put the money into the hands of the Board, and later on they tried to collect again. Under their theory, they'd be the ones to decide whether payment was made.

May I say this: that that is the logical result of their theory.

So I read the other briefs and I finally came to this one that I got Saturday, and then I got into other things and couldn't read it. This morning I started to run down the cases. They are not in point. But this is what I did find; one point on something you said; something that was said by a leading jurist in this country—his name is Learned Hand. And in a case cited by my brother, Judge Hand said:

"His back pay having been adjusted to his satisfaction, nothing further remains to be done as to him."

That is on Page 951 in the case of NLRB vs. New York Merchandise Company. And if that doesn't say that we are right, what does?

Your Honor, those are the very words of the Judge. And I was in a hurry to get in there this morning—

REFEREE SMART: What are the facts involved in that case?

MR. NATHANSON: The facts have nothing to do with this case at all. The facts are not in this case. They don't bother.

REFEREE SMART: They don't bother with that.

MR. NATHANSON: I may say I don't remember the facts, but that is what the Judge said.

May I state this is our theory. Our theory is payment. The reason right from the beginning, as far as we were concerned as between us, I said: "Whether we are employers or not is immaterial. We complied with the decree. And the Respondents complied with the decree."

REFEREE SMART: You understand that compliance with the decree has to be with the approval of the National Labor Relations Board.

MR. NATHANSON: I say, sir, furthermore if we don't comply with the decree—and I am glad you asked that question—

REFEREE SMART: Your contention is the National Labor Relations Board approved of the payment.

MR. NATHANSON: Yes, but I say something further. Mr. Vose made a remark that they could have brought me in for contempt. My answer to you is as follows: that these proceedings are the equivalent, under the Bankruptcy Act, as though he had brought me in for contempt upstairs. All that would happen would be that I'd be ordered to pay a fine if I am liable. You, sir, stand in the same position as any Judge upstairs, in these proceedings, under the Bankruptcy Act. I will give you the references. This is the Court of Bankruptcy.

REFEREE SMART: Subject to appeal to the Judge.

MR. NATHANSON: Naturally; but when he makes the decision, his decision is subject to appeal too. So all decisions are subject to appeal.

Now these proceedings in my opinion are in the same kind as in that particular case, and in the previous case cited by him, where the NLRB cites the employers in for contempt, whether they pay. In those particular cases cited by him, the Court goes on to make a computation and then says that the computation made by them was all right. But it reviews the facts and says, in one particular case, under the circumstances the way they figure is all right.

Now let's get the way I figure that and the way I said from the beginning. Their whole proof of claim, your Honor, is very mysterious. I like the word "mysterious". We object to the amended claim.

May I say this. There is also a tendency, in every administrative board—it isn't peculiar to this Board—to try to make its own process mysterious. May I say it is part of my business to take the mystery off all these boards. And according to them, like the attitude of the Union man who came here originally, we don't understand; originally

we didn't get into all these cases. My theory is that a lawyer in general practice can get into any case; if he applies himself, he will have a fresh viewpoint.

The way they prove this case is this—and I said to Mr. Lepie several times, "Never mind these remarks about co-operation"—that the claim is based upon so-called past earnings of the employees, prior to this Board. So I said to him, not once but several times, "Now look, in this particular case past earnings are not appropriate because the condition of the Company changed; and even if they had been employed, they would not have earned the same amount of money." For example, within two or three months after the so-called discharges, the Hill Company went out of existence.

REFEREE SMART: As I understand it, the Hill Company was in just during the war, transferred war work. When the war was over, their business stopped.

MR. NATHANSON: Well, they stopped in about March. But I said, "Assuming that you are right, I further maintain"—and that is where the employees came in existence—"that reinstatement means reinstatement to a former position; that while the MacKenzie Company, even if it hadn't gone bankrupt, would have to cooperate; he would certainly be in the Hill Branch of the business; that is where is former job was."

In other words, is that particular job still in existence? In reference to promotions and reference to seniority, and everything else.

Suppose, for example, there had been five branches of the Standard Oil Company, and a workman worked in one branch and that particular branch was abolished. Certainly, the National Labor Relations Board wouldn't require that that particular employee be shoved into another branch when all the other employees of that particular branch have lost their jobs.

So I argued right here, your Honor, for the first time: I said, "Reinstatement means reinstatement as a Hill employee, to what they were doing before," and that in any event the Hill Company was out of existence for practical purposes within three months. That is where I said to him about whose employees; employee in the particular place.

Suppose we by-pass those two steps; we by-pass the fact of the Hill Company earnings, we by-pass the fact of what reinstatement means? I say then, suppose he actually had been an employee of MacKenzie. MacKenzie is a seasonal operation. You have investigated. It is a seasonal operation. It dies after December 15 and doesn't wake up until May 15. Your computation is based on a full year's pay.

REFEREE SMART: There has been no evidence of their computation yet.

MR. NATHANSON: But they have the number of weeks. And as far as we are concerned—

REFEREE SMART: You mean in their claim.

MR. NATHANSON: Their claim; there is no evidence.

I want to show that I am willing to expose the whole record. Now there is something else to be said.

This is a court of equity. And the whole process, the whole theory behind the court is a court of equity. And when there are conflicting claims, you settle them here; you don't send them back to the place where the conflict arose. For example, a claim on taxes can now be settled here. The Federal Government—Mr. O'Meara never comes back here and says, "Mr. Referee, before you decide these taxes I want you to go to the Internal Revenue and take an appeal to the Tax Court." No; you settle here.

Furthermore, this is admittedly an unliquidated claim. It certainly wasn't liquidated at the time of the bank-

ruptcy; and under the Bankruptcy Act this is the only place where unliquidated claims can be settled.

I went over my time because I wanted to state my position so there won't be any issue that I haven't stated.

I want to say this. When I have time I will read these cases, and I will submit to your Honor a memorandum on the facts and laws.

REFEREE SMART: Within a week, I want a request of findings and facts; and put down the dates that you want the claims in—what you think the evidence justifies. I want both sides to do that.

MR. VOSE: Yes, your Honor.

REFEREE SMART: I won't make any finding until I get those findings of fact.

MR. VOSE: May we have the request for findings a week after we receive typewritten transcript?

REFEREE SMART: Yes, if they want that transcript referred to.

MR. VOSE: That is what I had in mind, your Honor.

REFEREE SMART: You are going to give me a copy of it?

MR. VOSE: Yes. I might suggest, if the Trustee is willing to consent to paying for his copy, he will have one sent directly to him.

MR. NATHANSON: Is it all right for your Honor, to order a copy?

REFEREE SMART: Yes.

MR. NATHANSON: All right; we will pay for a copy.

MR. VOSE: The reporter will send me one and send the referee one. And in view of the fact that Trustee wants a copy, I would like to instruct the reporter now to prepare four copies and send the fourth one to the Regional Office here in Boston.

MR. FRIEDMAN: Is it clear on the record, your Honor, that we have objected to the amended claim too?

REFEREE SMART: Oh yes.

The hearings are closed, as far as the evidence is concerned.

(Whereupon, at 4:30 p.m., Monday, April 17, 1950, the hearing in the above-entitled matter was closed.)

This is to certify that I, Elsie A. Ehrlich, having been duly sworn in the matter of MacKenzie Coach Lines, Inc., and Hill Transportation Company, and directed to officially report and transcribe the matters herein contained, do further certify that the foregoing volume, consisting of 132 pages, is a true and accurate transcript of my shorthand notes taken in the said matter of MacKenzie Coach Lines, Inc. and Hill Transportation Company, before Honorable W. H. Smart, Referee, on April 17, 1950.

ELSIE A. EHRLICH
Reporter

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

[Filed in Referee's Office May 9, 1950.]

Now comes the National Labor Relations Board by Owsley Vose, its Chief Enforcement Attorney, and respectfully submits its request that the Honorable Wilfred H. Smart, Referee in Bankruptcy, make the following findings of fact and conclusions of law upon the proceedings heretofore had herein:

I. Findings of Fact

A. Preliminary proceedings

1. On March 15, 1949, the National Labor Relations Board filed its claim for back pay due employees Harold

Bartlett, Alkernon Nichols, Robert Varney, C. R. Bunn, and Gerry Kimball under an order of the National Labor Relations Board against Hill Transportation Company and MacKenzie Coach Lines, Inc., dated February 4, 1948, enforced by decree of the Court of Appeals for the First Circuit on December 7, 1948. The amount of the claim was $5603.10, which reflected a credit of $500 which was paid by the Hill Transportation Company to the Union filing the charge on behalf of the men herein involved.

2. Louis K. Nathanson, Trustee in Bankruptcy in this proceeding, thereafter in conversations with Joseph Lepie, an attorney in the Regional Office of the National Labor Relations Board at Boston, Massachusetts, objected to the Board's claim against MacKenzie Coach Lines, Inc. upon the grounds that the employees to whom the back pay was directed to be paid were not the employees of the Bankrupt (Tr. 82-83 (Lepie)).

3. Because of the nature of the Trustee's objection to the Board's claim, he was unwilling to discuss the basis of the Board's computation of the amount due (Tr. 81, 82-83, 105 (Lepie)).

4. At the hearing on April 17, 1950, the Board filed its amended proof of claim for back pay due the aforesaid employees under the said order of the Board, as enforced by the Court. The amount of said amended claim was $4463.69, which also reflected a credit of $500 which was paid by Hill Transportation Company to the Union filing the charges on behalf of the men herein involved.

5. Thereafter, by letter dated April 24, 1950, Bernard L. Alpert, Regional Director, National Labor Relations Board, Region 1, Boston, Massachusetts, mailed to the Referee a substitute fourth page (headed Back Pay Computation) to the Board's Amended Proof of Claim correcting certain typographical errors in a few of the sub-totals contained in the back pay computation.

B. The contention that the National Labor Relations Board approved a settlement of the back pay obligation under its order

1. On or about December 10, 1948, a conference was held in the office of Samuel G. Zack, Chief Law Officer, National Labor Relations Board, First Region, concerning the Hill Transportation Company–MacKenzie Coach Lines, Inc., case (Tr. 19 (Shanahan), 49 (Zack), 71-72 (Lepie)).

2. Present at this conference were Patrick F. Shanahan, representing Hill Transportation Company, Joseph Lepie, Attorney, and Chief Law Officer Zack, representing the National Labor Relations Board (Tr. 19 (Shanahan), 49 (Zack), 72 (Lepie)).

3. At this conference Mr. Shanahan told Mr. Lepie and Mr. Zack that the claim of the men here involved had been represented to him as $800.00 (Tr. 19 (Shanahan)).

4. Mr. Shanahan further stated on this occasion that Hill did not agree to that amount but that Gerald Robinson, the treasurer of Hill Transportation Company, had been talking with Mr. French, the president of the Union here involved, and that a tentative agreement had been reached for the Company to pay and the men to accept $500 in full settlement of their claims for back pay under the Board's order (Tr. 19-20 (Shanahan)).

5. Mr. Shanahan specifically stated on this occasion that the aforesaid tentative agreement was subject to the approval of the National Labor Relations Board (Tr. 20 (Shanahan)).

6. Mr. Lepie stated at this conference that he had been informed by letter from Basil D. French, Secretary-Treasurer of the Union, that the amount of back pay involved was between $700 and $800 (Tr. 51, 52 (Zack), 75-77 (Lepie)).

7. Mr. Lepie further stated to Mr. Shanahan at this conference that if the amount was as stated by the Union,

approximately $700 or $800, and if the settlement was satisfactory to the employees, he would recommend to his superiors that the settlement be approved (Tr. 20, 34 (Shanahan), 72-73, 76 (Lepie)).

8. Mr. Lepie stated in this connection that he wanted to make sure that the men were willing to take $500 in settlement of their back pay claims and at the same time suggested that Mr. Shanahan accompany him to Manchester, New Hampshire, to talk with Mr. French, of the Union and the men themselves to find out if $500 was acceptable to the men (Tr. 20, 34, 39-40, 56 (Shanahan), 63 (Zack), 72 (Lepie)).

9. Mr. Lepie further stated at this time that he wanted to ascertain whether the Union had correctly informed the Regional Office as to the total amount of back pay due (Tr. 52-53, 63-65 (Zack), 72, 85 (Lepie)).

10. Mr. Shanahan stated in response to Mr. Lepie's invitation to accompany him to Manchester that he was busy and could not go, and suggested that possibly Mr. Robinson could drive Mr. Lepie up (Tr. 20 (Shanahan), 54 (Zack), 73 (Lepie)).

11. Mr. Lepie specifically requested Mr. Shanahan on this occasion, that when making payment he should direct it to the Board's Regional Office (Tr. 21 (Shanahan)).

12. Mr. Lepie declined Mr. Shanahan's tentative offer to have Mr. Robinson drive Mr. Lepie to Manchester and stated that he would get in touch with Mr. Shanahan later to arrange a mutually convenient date for them to go to Manchester to discuss the settlement (Tr. 54 (Zack), 73 (Lepie)).

13. Mr. Zack stated that whatever was agreed upon by Mr. Lepie and Mr. Shanahan would first have to be submitted for the approval of Mr. Alpert (Tr. 53 (Zack)).

14. Mr. Zack further stated at this conference that he would be inclined to recommend acceptance of the prof-

fered $500, if the $800 figure given by the Union were the correct total amount of back pay due, and if such a settlement met with the approval of the four men or their Union representative (Tr. 53-54, 59 (Zack)).

15. After the conference with Mr. Lepie and Mr. Zack on or about December 10, 1948, Mr. Shanahan reported to Mr. Robinson the discussion had at the conference (Tr. 21 (Shanahan)).

16. Mr. Robinson communicated with Mr. French of the Union who stated that there was no need of anybody coming to Manchester, that the men were satisfied to accept $500, requested Mr. Robinson to send the check to him instead of the National Labor Relations Board, and said he would pay the men and secure and sign the necessary release (Tr. 21 (Shanahan)).

17. Mr. Harry Parr, also an official of the Union here involved (Tr. 19), at some undisclosed time in December 1948 attempted to reach Mr. Zack by telephone, and in his absence, Mr. Lepie, who was also not available (Tr. 106-107 (Ramsey)). In the absence of both men the call was referred to Mr. Thomas H. Ramsey, an attorney in the Board's Regional Office (Tr. 106-107 (Ramsey)).

18. Mr. Parr told Mr. Ramsey over the telephone that Hill Transportation Company and MacKenzie Coach Lines, Inc. were in financial difficulty, that he had been having a series of discussions with representatives of the companies, and that he thought the possibilities of effecting a compromise settlement were excellent (Tr. 107 (Ramsey)).

19. Mr. Parr specifically asked Mr. Ramsey in this telephone conversation whether, if he, as a Union representative, and counsel for the Company did enter into a compromise settlement agreement, would that bar the National Labor Relations Board from taking further action in this case. Mr. Ramsey informed Mr. Parr that the National Labor Relations Board would give absolutely no effect to

any compromise settlement agreement entered into by the Union and the Company to which it, the National Labor Relations Board, was not a party (Tr. 107 (Ramsey)).

20. Prior to December 18, 1948, Mr. Robinson sent a check for $500, payable to the Union, to Mr. French of the Union (Tr. 21, 25, 67, 68 (Shanahan)).

21. In the interval between the conference on or about December 10, 1948 and the sending of the check to the Union, Mr. Lepie did not get in touch with Mr. Shanahan about going to Manchester, New Hampshire and Mr. Shanahan did not communicate with Mr. Lepie about the suggested trip (Tr. 54 (Zack)).

22. Mr. Lepie did not go to Manchester, New Hampshire, to make the desired investigations until about February 1949 (Tr. 80 (Lepie)).

23. The sending of the check directly to the Union was done without the knowledge of the Board (Tr. 85 (Lepie)).

24. The sending of the check directly to the Union was contrary to the request of Mr. Lepie (Tr. 21 (Shanahan)).

25. Upon receipt of the check from Mr. Robinson, Mr. French of the Union signed and sent back to Mr. Robinson a release, signed by Harry Parr, as President of the Union, and Basil D. French, as Secretary-Treasurer of the Union, stating that upon payment of $500 they did, as duly authorized agents, relieve Hill Transportation Company and MacKenzie Coach Lines, Inc., from all further claims as set forth by the National Labor Relations Board decision in Case No. C-1823 (Tr. 21 (Shanahan), Exh. 1).

26. No release from the men named in the Board's order here involved was ever furnished Hill Transportation Company or MacKenzie Coach Lines, Inc. (Tr. 22 (Shanahan)).

27. No evidence of the Union's authority to execute the release on behalf of the men has been introduced in this proceeding.

28. Thereafter Mr. Shanahan mailed the aforesaid release from the Union to Mr. Zack together with a certificate of compliance with the Court decree (Tr. 23-25 (Shanahan), Exh. 1).

29. These documents were received in the Board's Regional Office on December 28, 1948 (Tr. 68-69).

30. Upon receipt of the aforesaid documents, the Regional Office was informed for the first time of the payment of the $500 to the Union (Tr. 60-61 (Zack), 83 (Lepie)).

31. On January 26, 1949,[1] Bernard L. Alpert, Regional Director, National Labor Relations Board, Region 1, mailed a letter to Mr. Shanahan which, after referring to the $500 payment to the Union, stated that the settlement was entered into without prior approval of the Regional Office and therefore could have no binding effect as far as the liability of the companies was concerned (Tr. 40-41, 61 (Zack)).

In the aforementioned letter the Regional Director referred to the fact that the men involved had not received their proportionate shares of the $500 paid to the Union (Tr. 41).

33. At the time this letter was written Mr. Lepie had not yet interviewed the men concerning their back pay losses and their reaction to the settlement and the Regional Office had no information concerning the total amount of back pay due other than that furnished by the Union (Tr. 52-53, 57 (Zack), 80, 84 (Lepie)).

34. In the following month Mr. Lepie went to Manchester, as originally suggested by him, and interviewed the individual men here involved concerning their average weekly earnings with the companies and their subsequent earnings (Tr. 80 (Lepie)).

---

[1] The record erroneously states the date of this letter as January 16, 1946. The actual date of the letter as shown by the duplicate original copy in the Board's official files is as shown above.

35. At this time Mr. Lepie also verified the employees' statements as to subsequent earnings with information obtained from the Social Security Administration in Baltimore, Maryland (Tr. 80-81 (Lepie)).

36. Using the information thus obtained, Mr. Lepie computed the amount of back pay due each employee by multiplying the employees' average weekly earnings by the number of weeks elapsing between the discharge and the offer of reinstatement and from this product subtracting the employees' interim earnings during the same period (Tr. 80-81 (Lepie)).

37. The computation thus made furnished the basis for the amount claimed in the Board's original proof of claim herein filed in the amount of Five Thousand Six Hundred and Three Dollars and Ten Cents ($5603.10) (Tr. 31-32 (Shanahan), 81 (Lepie)).

II. Conclusions of Law

A. The Board's amended proof of claim dated April 14, 1950, as amended by letter of Bernard L. Alpert, Regional Director, National Labor Relations Board, dated April 21, 1950, in the amount of Four Thousand Four Hundred Sixty Three Dollars and Sixty-Nine Cents ($4463.69), has been duly filed in these proceedings.

B. The Board's amended proof of claim referred to above is to enforce a liability to pay back pay imposed by the National Labor Relations Board, after proceedings under Section 10 of the National Labor Relations Act, in an order entered against Hill Transportation Company and MacKenzie Coach Lines, Inc., dated February 4, 1948.

C. The liability to pay back pay imposed as stated in the preceding paragraph has been affirmed by the decree of the Court of Appeals for the First Circuit dated December 7, 1948.

D. The Board's claim, as set forth in the aforesaid amended proof of claim, is provable in bankruptcy as founded upon "a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the petition," within the meaning of Section 63 (a) (1) of the Bankruptcy Act.

E. The Board's claim is entitled to priority as a debt due to the United States under Section 64 (a) (5) of the Bankruptcy Act.

F. Neither Mr. Zack nor Mr. Lepie approved any settlement of the back pay liability under the aforesaid order of the Board.

G. Neither the National Labor Relations Board nor any authorized agent thereof has approved any settlement of the back pay liability under the aforesaid order of the Board.

H. The Trustee having objected to the amount of the Board's claim, the claim is unliquidated.

I. The Board's claim may be liquidated by agreement between the Board and the Trustee, subject to the approval of the Bankruptcy Court.

J. The Bankruptcy Court has no jurisdiction to determine the amount of back pay due under an order of the National Labor Relations Board.

K. The National Labor Relations Board has exclusive jurisdiction to determine the amount of back pay due under its orders.

L. The determination by the National Labor Relations Board of the amount of back pay due, made in formal proceedings in which the Trustee is entitled to participate as a party, is *res judicata* in this Court, subject to the right of the Trustee to obtain review of the Board's determination in the Court of Appeals.

M. The decree of the Court of Appeals enforcing the Board's order is binding in the bankruptcy proceedings as to matters adjudicated therein.

N. In the event that the amount of back pay is relevant to a decision upon the Board's claim, the Bankruptcy Court must withhold ruling thereon pending determination by the Board, after formal proceedings under the National Labor Relations Act, as to the precise amount of back pay due each employee under the Board's original decision and order.

O. The Board's claim is allowable.

Respectfully submitted,

OWSLEY VOSE
Chief Enforcement Attorney
National Labor Relations Board
Washington 25, D. C.

Dated: May 8, 1950.

REFEREE'S ORDER DISALLOWING AMENDED PROOF OF CLAIM.

[June 29, 1950.]

At Boston, in said district, on the 29th day of June, 1950.

Upon consideration of the amended proof of claim filed by National Labor Relations Board, now, after due hearing and upon consideration of the evidence presented and arguments of counsel,

IT IS HEREBY ORDERED that the said amended proof of claim be, and the same hereby is, disallowed.

W. H. SMART
Referee in Bankruptcy.

PETITION FOR REVIEW.

[Filed with Referee July 8, 1950.]

To Wilfred H. Smart, Esquire
Referee in Bankruptcy

1. Your petitioner, National Labor Relations Board, is aggrieved by the order herein of *Wilfred H. Smart*, Referee in Bankruptcy, dated June 29, 1950, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The Referee erred in respect to said order in refusing to make the findings of fact and adopt the conclusions of law requested by your petitioner.

3. The Referee erred in respect to said order in failing to make any findings of fact or state any conclusions of law disclosing the basis for his said order. In the event that the Referee, in the course of this proceeding, should issue such findings of fact and conclusions of law, your petitioner will respectfully seek leave of this Court to amend this petition for review to set forth the alleged errors in respect to the Referee's order in greater detail.

4. The Referee erred in respect to said order in disallowing petitioner's claim instead of either making an order deferring decision on the Board's claim until after liquidation thereof by the Board, or making an interlocutory order adjudicating the Board's claim as allowable on principle and entitled to the priorities claimed in the Board's Proof of Claim and deferring decision on the amount thereof until after liquidation of the claim in the manner contemplated by Congress in the National Labor Relations Act.

WHEREFORE your petitioner prays:

1. That said order of the Referee be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy.

2. That said order be reversed, and that either an order be made postponing decision on the Board's claim until after liquidation thereof by the Board, or that an interlocutory order be made adjudicating the Board's claim as allowable on principle and entitled to the second and fifth priorities and deferring decision on the amount thereof until after liquidation of the claim by the Board.

3. That your petitioner have such other and further relief as is just and proper.

OWSLEY VOSE
Assistant Chief, Enforcement Branch
National Labor Relations Board,
Washington 25, D. C.

Dated: July 7, 1950.

Exhibit A.

UNITED STATES DISTRICT COURT
District of Massachusetts

In the Matter of
MacKenzie Coach Lines, Inc., Bankrupt. In Bankruptcy No. 70284

REFEREE'S ORDER DISALLOWING AMENDED PROOF OF CLAIM

At Boston, in said district, on the 29th day of June, 1950.

Upon consideration of the amended proof of claim filed by National Labor Relations Board, now, after due hearing and upon consideration of the evidence presented and arguments of counsel,

IT IS HEREBY ORDERED that the said amended proof of claim be, and the same hereby is, disallowed.

/s/ W. H. SMART
Referee in Bankruptcy

CERTIFICATE BY REFEREE TO JUDGE.

[Filed December 4, 1950.]

I, W. H. Smart, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:

1. Whether the Amended Proof of Claim filed by the National Labor Relations Board was properly disallowed.

During the course of the proceedings witnesses were called by the petitioner and respondent. The hearing began on January 19, 1950, at which time there was no stenographer present. This hearing was continued to April 17, 1950, at which time a stenographer was present and reported the evidence in accordance with the transcript of testimony attached to this certificate and made a part hereof.

A copy of a Certificate of Compliance was offered as an exhibit, and is hereby made a part of this certificate.

Findings of Facts

This case arose out of a complaint filed by the International Brotherhood of Teamsters against the Hill Transportation Co. and the Bankrupt for engaging in unfair labor practices, particularly in discharging Elwyn Bartlett, Harold Bartlett, Alkernon Nichols, Robert Varney, C. R. Bunn and Gerry Kimball for union activities. These discharges took place on March 25, 1946. After numerous hearings, on February 4, 1948, the National Labor Relations Board issued an order against both companies stating that they had discriminated against the named employees for engaging in union activities. This order further directed that the said companies reinstate said employees, except Gerry Kimball, to their former positions and make whole all of said employees for any loss

of pay suffered by them as a result of such discrimination by paying to each of them a sum of money equal to that which he normally would have earned as wages during the period from the date of discrimination to the date of offer of reinstatement, less his net earnings during that period. As a matter of fact, it is undisputed that Kimball was offered reinstatement on November 11, 1946; Harold Bartlett was offered reinstatement on June 1, 1947; and Nichols and Varney were offered reinstatement on July 25, 1947. All of these employees had gone to work elsewhere. The Hill Company and the Bankrupt had common officers and directors, but were two distinct companies operating under different franchises. The Hill Transportation Co. had ceased operations in June 1946, having been a wartime business for transporting employees of the Portsmouth Navy Yard. The Bankrupt company, which transported passengers to the Maritime Provinces, was a seasonal operation from May 15th to December 15th. In 1947 it got into financial difficulties which culminated in the appointment of a State Court Receiver in February 1948, and was petitioned into bankruptcy in June, 1948. After the issue of the order of the National Labor Relations Board in February, 1948, conversations took place between the officers of the Union, the employees of the National Labor Relations Board and Attorney Patrick Shanahan, attorney for the Hill Transportation Company, as to the amount due for any loss of pay suffered by the employees. It appeared that C. R. Bunn had immediately departed for parts unknown and is not involved in this dispute. No claim is made for Elwyn Bartlett, who apparently suffered no loss. As a result of these conversations, on May 7, 1948, Basil D. French, Secretary-Treasurer of the Union involved, wrote a letter to Joseph Leppe, Esq., attorney for the National Labor Relations Board, assigned to the handling of the compliance phases of these cases, in

which he stated that the amounts due the men were between seven and eight hundred dollars. Subsequently these amounts were disputed by Mr. Robinson, who had been Treasurer of both the Hill Transportation Co. and the MacKenzie Coach Lines, Inc. The National Labor Relations Board petitioned the United States Circuit Court of Appeals for a decree enforcing the order of the Board. Such a decree was issued on December 7, 1948. In the meantime, Mr. Lepie had been in discussions with Mr. Shanahan and the officers of the Union as to the amount due. The matter of the amount due was also negotiated by Mr. French, the Secretary-Treasurer of the Union, and Mr. Robinson. They finally agreed that five hundred dollars was a fair payment of the four claims. Mr. Shanahan came to the office of the National Labor Relations Board and reported this to Mr. Lepie, who said that if that was the view of the four men that the National Labor Relations Board, through his office, would offer no objection, but that he wanted to be sure that that was what the men were willing to take. Mr. Lepie suggested that they both go up to New Hampshire and talk with Mr. French and the men. Mr. Shanahan told Mr. Lepie that he trusted him and that he could go up himself. Arrangements were then made for Mr. Robinson to drive Mr. Lepie to New Hampshire. When Mr. Robinson reported the result of the conversation to Mr. French, the Secretary-Treasurer of the Union, the latter said that the men were perfectly satisfied to accept the five hundred dollars and to send the money to him directly and he would pay the men and would sign the necessary release. Mr. Robinson sent his check for five hundred dollars to Mr. French. Mr. French sent to Mr. Robinson a release executed by the officers of the Union. This release, together with a certificate of compliance with the court order, was then mailed on December 18, 1948, by Mr. Shanahan to Mr. Samuel G. Zack, Chief Counsel for the

National Labor Relations Board in Boston, the letter containing a request that Mr. Zack file the certificate of compliance in court. The certificate of compliance was not filed in Court, nor was it returned, Mr. Lepie stating that he did not file it because he was not obliged to do so. When Mr. French received the five hundred dollars, he deducted about one-half the amount for Union dues and paid the men the balance. The men complained to the National Labor Relations Board, and on being informed by the Board that the deductions were improper the Union paid to the men the amounts deducted. At the time of the complaint of the men for these deductions, Mr. Bernard L. Alpert, Regional Director of the National Labor Relations Board, wrote a letter to Mr. Shanahan containing the following sentence: "I have been informed that they have not received their proportionate share of the five hundred dollars, Bartlett having been paid $128.80, Kimball $97.00, Nichols $62.50 and Varney $135.63. Roughly, these amounts represent only fifty per cent. payment on the *back pay actually due* and they will be considered as having been paid on account of the total amounts due in order that full compliance may be effected in accordance with the terms of the outstanding decree." Mr. Parr, the President of the Union, testified that when these men were paid the amounts deducted they were perfectly satisfied. The matter then rested for some time and the case was apparently closed. On March 16, 1949, the National Labor Relations Board filed a proof of claim for an amount in excess of five thousand dollars. There was no further hearing held by the National Labor Relations Board on the computation of back pay. No evidence was presented as to how the question of back pay arose again. Mr. Lepie testified that sometime in 1949 he made a computation based upon what the men had earned for three months prior to their discharge. No hearings were conducted by

the Board. Mr. Lepie did not take into account the undisputed fact that these men were only on the payroll of the Hill Transportation Co., whose operations were distinct from those of the Bankrupt, and that the Hill Transportation Co. had ceased operations in June, 1946, nor did he take into account the fact that the operations of the MacKenzie Coach Lines were seasonal. He did not take into consideration the history of the companies after March 25, 1946, despite the fact that an employee of the National Labor Relations Board had an opportunity to examine and did examine the books of both the Hill Transportation Co. and the MacKenzie Coach Lines, Inc.

I further find as a fact that the employees in whose behalf the National Labor Relations Board is seeking to enforce its claim were never in fact employees of this bankrupt corporation, if I am permitted to make such a finding in view of the National Labor Relations Board petition to the Circuit Court of Appeals, on which a decree was issued on December 7, 1948. I rule as a matter of law that as Referee in Bankruptcy I have the sole right to decide whether or not a person was an employee of the bankrupt corporation, and that I am not bound by the Circuit Court's decree of compliance in this respect.

I further find that the claim of the petitioner herein is not liquidated and has never been legally liquidated.

ORDER OF REFEREE

Referee's Order Disallowing Amended Proof of Claim is as follows:

"At Boston, in said district, on the 29th day of June, 1950.

Upon consideration of the amended proof of claim filed by National Labor Relations Board, now, after

due hearing and upon consideration of the evidence presented and arguments of counsel,

IT IS HEREBY ORDERED that the said amended proof of claim be, and the same hereby is, disallowed."

PETITION FOR REVIEW

On the 8th day of July, 1950, a Petition for Review was filed in this court by the National Labor Relations Board, which Petition for Review is attached to this certificate and made a part of this record.

I am also attaching the Amended Proof of Claim filed by the National Labor Relations Board.

And the said question is certified to the Judge for his opinion thereon.

Dated at Boston this 1st day of December, 1950.

W. H. SMART
Referee in Bankruptcy.

Affidavit of Compliance.

And now comes Gerald R. Robinson, President of Hill Transportation Company and General Manager of MacKenzie Coach Lines, Inc., and under oath says that decree of this Court in case no. 1-C-2823, has been complied with by posting as therein required and by payment to Local Union No. 633 of International Brotherhood of Teamsters, Chauffeurs Warehousemen, and Helpers of America, A.F. of L. of sum of five hundred dollars as per original release hereto attached.

COMMONWEALTH OF MASSACHUSETTS

Essex, ss. Lynn, December 18, 1948

Subscribed and sworn to before me,

PATRICK F. SHANAHAN
Notary Public

To whom it may concern:

Whereas, the Trial Examining Division of the National Labor Relations Board in Washington, D.C. having acted upon and, further, made a decision on Case No. 1-C-2823 (Hill Trans. Co & MacKenzie Coach Line, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 633, A. F. of L.) whereby Harold Bartlett, Robert Varney, Alkernon Nichols and Gerry Kimball were granted certain sums of money, and

Whereas, the Local No. 633 through its President, Harry Parr, and Secretary-Treasurer, Basil D. French, have received written authorization from Harold Bartlett, Robert Varney, Alkernon Nichols and Gerry Kimball to bring about a settlement on their behalf, and,

Whereas, the Hill Transportation Company and MacKenzie Coach Lines, Inc. through Gerald Robinson, President, have tendered an offer of the sum of five hundred dollars ($500.00) in full settlement of all claims entered by Harold Bartlett, Robert Varney, Alkernon Nichols and Gerry Kimball and such sum of money will be distributed by Local No. 633 to said named men as previously agreed.

Therefore, the undersigned, acting as duly authorized agents with full power to make settlement on same, do, upon receipt of cash or certified check for the amount of five hundred dollars ($500.00) and by signing this release, relieve said Hill Transportation Company and MacKenzie Coach Lines, Inc. its officers, etc. of any and all further

claims as set forth by the National Labor Relations Board decision on Case No. 1-C-2823.

/s/ HARRY PARR President
/s/ BASIL D. FRENCH Sec-Treas.
Local Union No. 633 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L.

Subscribed and sworn to before me this 9 day of December 1948

A notary public authorized by law to administer oaths and take acknowledgments in and for the county of Hillsborough State of New Hampshire

My Commission expires June 2-1953

/s/ MILDRED F. CHICOYNE
(Signature)

SUPPLEMENT TO PETITION OF NATIONAL LABOR RELATIONS BOARD FOR REVIEW OF REFEREE'S ORDER.

[Filed January 24, 1951.]

To Wilfred H. Smart, Esquire,
Referee in Bankruptcy:

1. On July 8, 1950, your petitioner, National Labor Relations Board, filed its Petition for Review of the Referee's order of June 29, 1950, disallowing petitioner's Proof of Claim. In said Petition the National Labor Relations Board, hereinafter referred to as the Board, requested leave to amend the same by making the assignment of errors therein more specific and definite at the time the Referee would disclose the grounds in fact and/or law on which his said order was bottomed.

2. The Referee's "Certificate By Referee to Judge," dated December 1, 1950, contains findings of fact and conclusions of law, thus, for the first time, making it possible for petitioner to add specific assignments of error to those assignments already made in the Petition for Review.

3. The Referee erred in said certificate in respect of matters of law, as follows:

(1) In failing to state on what ultimate conclusion or conclusions of fact and/or law his order disallowing the Board's Proof of Claim was based;

(2) In failing to apply the rule that the determination in the Board's order, as enforced by the Court of Appeals, of all issues of law and fact which arose in the unfair labor practice proceedings before the Board, is final and binding in the bankruptcy proceedings and that these issues may not be reopened in the bankruptcy proceedings, or their determination reviewed and overthrown by the Referee (see Board's Brief in Support of Petition for Review, pp. 8-18).

(3) In failing to apply the rule that the determination of the amount of back pay due, being part of the Board's exclusive function to decide how the effects of unfair labor practices may be expunged, is confided solely to the Board, and that consequently no court should undertake this function (see Board's Brief, pp. 20-24, especially at pp. 20, 22).

(4) In failing to recognize that the Board's tentative computation of back pay on which the Board's Amended Proof of Claim is based, is not final; that ever since the Board's first Proof of Claim was filed herein the Trustee in Bankruptcy has been under the duty to disclose to the Board his objections, if any, to the computation of back pay so made, or else to acknowledge the correctness of the computation; that the final determination of the amount of back pay should be made informally, if possible, and otherwise in formal proceedings conducted by the Board

in which the Trustee has the right fully to participate as a party; and that the bankruptcy court should stay its hand pending the outcome of such proceedings before the Board (see Board's Brief, pp. 18-24, especially at pp. 19, 22-24).

(5) In failing to recognize that the only issues of fact before him were those connected with the issue of whether the Board was a party to a compromise settlement with regard to the claim made by it in the bankruptcy proceedings.

(6) In failing to recognize that the only issues of law before him were whether the Board's claim was barred by a compromise settlement, whether the claim was provable and allowable in bankruptcy, and to which priority or priorities, if any, it was entitled.

(7) In making findings of fact, or reciting facts or testimony, with regard to issues not within his jurisdiction, such as findings with regard to: the times when certain employees were offered reinstatement; the fact that those employees had gone to work elsewhere; the relationship, businesses and operations of Hill Transportation Co. and the bankrupt (Certificate by Referee to Judge, p. 2); the elements of the tentative computation of back pay made by Board Attorney Lepie; and the question whether the employees entitled to back pay under the Board's order and the decree of the Court of Appeals were employees of the bankrupt (Certificate pp. 4-5).

(8) In concluding (as the Referee apparently has), that the Board's claim is barred by a compromise settlement to which the Board was a party (Certificate, pp. 2-4).

(9) In concluding, if the referee did in fact so conclude, that the Board's proof of claim should be disallowed because it is not now "legally liquidated," since there is no basis for any finding that liquidation would unduly delay the administration of the estate and since the claim could have been liquidated long ago had the trustee cooperated with respect to reaching an informal agreement with the

Board as to the amount of back pay due (Certificate, p. 5; see Board's Brief, p. 19).

4. The Referee erred in respect to findings of fact supporting his said order of June 29, 1950, as follows:

(1) In finding that the case arose out of a "complaint" filed by the International Brotherhood of Teamsters, whereas it arose out of a complaint issued by the Board, following the filing of a charge by said union (Certificate, p. 1; see Board's Brief in Support of Petition for Review, p. 1);

(2) In failing to find that all utterances of agents of the Board with regard to approval of the $500 settlement were made on the basis of their expectation that, upon investigation, the representation of the companies and the union that the amount of back pay was about $800 would be found correct, but that such utterances were always conditioned upon the outcome of such investigation (see Board's Brief, p. 5);

(3) In finding, in the event the Court deems the following a finding of fact, that Bernard L. Alpert, the Board's Regional Director in Boston, in his letter to Mr. Shanahan indicated his approval of the figure of approximately $800, as the amount of back pay actually due, when in fact the full text of the letter shows that the Regional Director, proceeding under the assumption adverted to above that "the back pay actually due" would upon investigation prove to be $800 as represented, expressly disapproved the settlement (Certificate, p. 4; see Board's Brief, pp. 5-6, and text of letter in Transcript of Hearing of April 17, 1950, pp. 40-41).

(4) In finding that around February, 1949, "the case was apparently closed" and that thereafter "the question of back pay arose again," whereas the case had remained open and pending in the Board's Regional Office at all times (Certificate, p. 4; see Board's Brief, pp. 5-7).

(5) In failing to find that upon investigation the Board's attorney, Joseph Lepie, concluded that the amount of back pay due was actually a sum far in excess of the $800 represented as the basis of the proposed compromise settlement, and that he believed the amount to be $5603.10 (see Board's Brief, pp. 6-7);

(6) In failing to find that neither the Board nor any officer, attorney, or employee of the Board, with or without authority, gave or purported to give consent on behalf of the Board to a compromise agreement with regard to the amount of payment of back pay (see Board's Brief, Argument, point III, p. 24 *et seq*).

WHEREFORE, your Petitioner prays that the relief requested in the Petition for Review be granted.

A. NORMAN SOMERS
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

Dated: December 18, 1950.

[CLERK'S MEMORANDUM: September 17, 1951, this matter came on before the court (Wyzanski, J.) upon the question certified to the judge by the referee. Decision reserved.

JOHN A. CANAVAN, *Clerk.*]

ORDER.

[September 28, 1951.]

At Boston, in said District, on the 28th day of September, A. D. 1951, upon the question certified to the Court by the Referee in said matter on the 4th day of December, 1950, and after hearing arguments of Gerald F. Krassa, Esquire, counsel for The National Labor Relations Board,

petitioner, and of Louis K. Nathanson, Trustee in Bankruptcy, and after due consideration of the same;

IT IS HEREBY ORDERED THAT

(1) the Referee's disallowance of the Board's amended claim be set aside,

(2) the Referee permit the matter to stand in abeyance for 2 months to permit the Board, in accordance with the National Labor Relations Act, to fix the precise amount now owing from the bankrupt to the Board and to file with the Referee an amendment to its claim showing such amount, and

(3) the Referee proceed in other respects in accordance with this opinion.

WITNESS, the Honorable CHARLES E. WYZANSKI, Jr. Judge of said Court, and the seal thereof, this 28th day of September, A. D. 1951.

WYZANSKI J.
Sep. 28, 1951.

KATHLEEN M. O'DEA
Deputy Clerk.

OPINION.

September 27, 1951.

WYZANSKI, J.

The National Labor Relations Board has petitioned for review of the order of Referee in Bankruptcy Smart, which disallowed the Board's claim. These are the facts—

On January 3, 1947 the Board issued a complaint against the present bankrupt and another alleging that they had engaged in unfair labor practices in violation of the National Labor Relations Act. After appropriate proceedings, the Board on February 4, 1948 ordered the bankrupt to pay certain persons back pay from the date of discrimi-

nation found by the Board to the date of an offer of reinstatement. June 7, 1948 an involuntary petition in bankruptcy was filed against the bankrupt. December 7, 1948 the Court of Appeals of this Circuit entered its decree enforcing the Board's order. March 15, 1949 the Board filed with the Referee its proof of claim for the back pay of the persons covered by the Court's decree. The Referee held a hearing on April 17, 1950 at which he entertained an amendment to the claim and took evidence. June 29, 1950 the Referee disallowed the claim. His reasons, given in his December 1, 1950 certificate to this Court, were that the persons covered by the back pay order were not employees of the bankrupt; that the claims of those persons had, in any event, been compromised by them and the bankrupt; and that the claims were not liquidated.

Neither the reasons given by the Referee, nor the additional reasons urged in this Court by the Trustee in Bankruptcy warranted the Referee's action in disallowing the Board's amended claim.

1. The National Labor Relations Board is the exclusive agency, subject to review by appellate courts of the United States, for determining whether under the National Labor Relations Act, a person is an "employer" of another and obligated to make restitution to that other. §10(a) of the National Labor Relations Act, as amended. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. A referee in bankruptcy has no authority at any stage to rule upon such matters.

2. The Board's order of February 4, 1948 was a final administrative determination that the future bankrupt was liable to make compensation according to a declared formula. Although the bankrupt's failure to comply with that order would not have been a contempt or a crime, the order constituted an obligation fixed by a quasi-judicial

agency and enforceable in an appellate court. Unless an aggrieved party sought review in an appellate court the order represented the ultimate decision on liability by a tribunal created by Congress for the resolution of particular types of controversies.

The precise problem is whether such a final decision on liability by a quasi-judicial agency is a "judgment" within §63(a)(1) of the Bankruptcy Act, 11 U.S.C. §103(a)(1). The objections to so regarding it are that the Board's order is not denominated a judgment; it does not appear upon a technical judgment-roll; it was made by persons called officers rather than judges; and it is enforceable only in a United States appellate court and is not self-executing, nor subject to levy by a marshal or sheriff, nor appropriate for contempt proceedings, nor available as a quasi-contractual right presentable to a court of general jurisdiction. These distinctions are undeniable. But they have nothing to do with the policy of the Bankruptcy Act. As shown by the conjunction of the word "judgment" and the phrase "an instrument in writing", §63(a)(1) is not concerned with differences between judicial and quasi-judicial tribunals. The word "judgment" as used in that section means no more than a final and hence certain determination of liability made by an appropriate public tribunal prior to the petition in bankruptcy. The order of the National Labor Relations Board of February 4, 1948 which finally determined liability and prescribed the formula for calculation of compensation is such a "judgment". *Lane* v. *Industrial Commissioner*, 54 F. (2d) 338 (C.A. 2), affirming *In Re Auerbach*, 53 F. (2d) 482 (S.D.N.Y.) seems to be contrary to my reasoning. But I regard the opinion as unpersuasive.

In reaching my conclusion that the Board's order was a judgment I have not overlooked the point that although liability had been fixed, it was necessary to compute

amounts of compensation due under the formula. But as the patent cases teach, this future calculation did not prevent the Board's order from constituting "a fixed liability, as evidenced by a judgment . . . absolutely owing at the time of the filing of the petition". *Haynes Stellite Co.* v. *Chesterfield*, 97 F. (2d) 985 (C.A. 6).

3. After the Board issued its order, there were various attempts of the bankrupt and others to effectuate a compromise. No purpose would be served by reviewing the evidence. For there is no adequate showing that the Board gave anyone authority to act for it in reducing the bankrupt's obligation to the Board, or that any agent of the Board entered into any final agreement for a commutation of the liability. Unless the Board consents, the bankrupt's obligation to the Board cannot be effectively compromised. Agreements made with an employer by actual or prospective recipients of back pay awards cannot defeat the Board's rights.

4. The Board's claim is entitled to priority as a debt owing to the United States under §64(a)(5) of the Bankruptcy Act. *N.L.R.B.* v. *Killoren*, 122 F. (2d) 609 (C.A. 8). Cf. *Bramwell* v. *U. S. Fidelity Co.*, 269 U.S. 483.

Ordered that (1) the Referee's disallowance of the Board's amended claim be set aside, (2) the Referee permit the matter to stand in abeyance for 2 months to permit the Board, in accordance with the National Labor Relations Act, to fix the precise amount now owing from the bankrupt to the Board and to file with the Referee an amendment to its claim showing such amount, and (3) the Referee proceed in other respects in accordance with this opinion.

WYZANSKI
United States District Judge

NOTICE OF APPEAL.

[Filed October 16, 1951.]

Notice is hereby given that Louis K. Nathanson, Trustee in Bankruptcy of MacKenzie Coach Lines, Inc., appeals to the United States Court of Appeals for the First Circuit from the order entered in this matter by the Court on September 28, 1951, setting aside the Referee's disallowance of the amended proof of claim filed by the National Labor Relations Board, etc.

LOUIS K. NATHANSON
Trustee in Bankruptcy of MacKenzie
Coach Lines, Inc.

STIPULATION.

[Filed October 16, 1951.]

Whereas the United States District Court for the District of Massachusetts has entered an order reversing the action of the Referee in disallowing the amended proof of claim filed by the National Labor Relations Board, and whereas the trustee in bankruptcy of MacKenzie Coach Lines, Inc. has filed an appeal to the United States Court of Appeals for the First Circuit from said order and desires a stay on appeal, it is hereby stipulated as follows:

Judgment on the order entered by the District Court is to be stayed, and to take the place of a supersedeas bond the trustee in bankruptcy agrees to hold intact the sum of Six Thousand ($6,000.00) Dollars conditioned to the satisfaction of any judgment that may finally be entered in the above named case on the proof of claim filed by the National Labor Relations Board, said sum of money to be held

subject to the same conditions as a bond filed under Rule 73 (d) of the Federal Rules of Civil Procedure.

LOUIS K. NATHANSON
Trustee in Bankruptcy

A NORMAN SOMERS
Assistant General Counsel
National Labor Relations Board

Dated at Washington DC
Oct. 9, 1951

Approved
WYZANSKI J.
Oct 16 '51

STATEMENT OF POINTS.

[Filed October 16, 1951.]

The appellant respectfully submits that the Court erred in the following points of law:

1. The Court erred in ruling that a Referee in Bankruptcy has no authority at any stage to rule upon matters involving the question whether a person is an employer under the National Labor Relations Act and the extent to which an employer is obligated to make restitution.

2. The Court erred in finding that the order of the National Labor Relations Board of February 4, 1948 was a final administrative determination that the future bankrupt was liable to make compensation according to a declared formula.

3. The Court erred in not ruling that the claim of the National Labor Relations Board was unliquidated.

4. The Court erred in not ruling that an unliquidated claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the Bankruptcy Court.

5. The Court erred in not ruling that the back pay order had been fully complied with.

6. The Court erred in ruling that the claim filed by the National Labor Relations Board is entitled to priority as a debt owing to the United States under Sec. 64(a)(5) of the Bankruptcy Act.

Respectfully submitted,
LOUIS K. NATHANSON
Trustee in Bankruptcy

DESIGNATION OF RECORD ON APPEAL.

[Filed October 16, 1951.]

Now comes the appellant, and designates that the following be included in the record on appeal:

1. Certificate by Referee to Judge.
2. Transcript of testimony attached to certificate and made a part thereof.
3. Copy of certificate of compliance offered as an exhibit, and made a part of the certificate.

LOUIS K. NATHANSON
Trustee in Bankruptcy of MacKenzie Coach Lines, Inc., Appellant

---

APPELLEE'S AMENDED DESIGNATION OF RECORD ON APPEAL.

[Filed November 9, 1951.]

The National Labor Relations Board, Appellee, in lieu of the materials previously designated in Appellee's Designation of Record on Appeal dated October 24, 1951, hereby designates the following materials to be included in the

record on appeal in addition to the materials designated by appellant on October 16, 1951:

1. Amended Proof of claim of National Labor Relations Board filed April 17, 1950 and letter of April 21, 1950, with attachment correcting certain typographical errors therein.

2. Decision and Order of National Labor Relations Board in Matter of Hill Transportation Company and MacKenzie Coach Lines, Inc., Case No. 1-C-2823, dated February 4, 1948, attached to Board's proof of claim.

3. Decree of United States Court of Appeals for the First Circuit in National Labor Relations Board v. Hill Transportation Company and MacKenzie Coach Lines, Inc., No. 4395, dated December 7, 1948, attached to Board's Proof of Claim.

4. Board's Request for Findings of Fact and Conclusions of Law, dated May 8, 1950.

5. Referee's Order Disallowing Amended Proof of Claim, dated June 29, 1950.

6. Board's Petition for Review of Referee's Order, dated July 7, 1950, and Supplement to Petition, dated December 18, 1950.

7. Order of Honorable Charles E. Wyzanski, U. S. District Judge, dated September 28, 1951, and opinion thereon, dated September 27, 1951.

/s/ A. NORMAN SOMERS
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 7th day of November 1951.

CLERK'S CERTIFICATE.

I, JOHN A. CANAVAN, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the matter designated by the parties and constitutes the record on appeal in the cause entitled:

In Bankruptcy No. 70284

IN THE MATTER OF

MACKENZIE COACH LINES, INC.,

in said District Court determined.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this twenty-sixth day of November, 1951.

JOHN A. CANAVAN,
Clerk.

(Seal)

[fol. 145] UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1951

No. 4614

LOUIS K. NATHANSON, Trustee in Bankruptcy of MACKENZIE COACH LINES, INC., Appellant

v.

NATIONAL LABOR RELATIONS BOARD, Appellee

Appeal from the United States District Court for the District of Massachusetts

[100 F. Supp. 489]

Before Clark, Woodbury and Hartigan, Circuit Judges

Louis K. Nathanson, pro se.

Owsley Vose, Attorney, with whom George J. Bott, General Counsel, David P. Findling, Associate General Counsel, A. Norman Somers, Assistant General Counsel, and Harvey B. Diamond, Attorney, were on brief for appellee.

OPINION OF THE COURT—February 11, 1952

HARTIGAN, Circuit Judge:

This is an appeal by the Trustee in Bankruptcy of MacKenzie Coach Lines, Inc., from an order of the United States District Court for the District of Massachusetts, dated September 28, 1951, setting aside the bankruptcy referee's disallowance of the amended claim of the National Labor Relations Board. The referee was also [fol. 146] ordered to permit the matter to stand in abeyance for 2 months to permit the Board, in accordance with the National Labor Relations Act, to fix the precise amount now owing from the bankrupt to the Board and to file with the referee an amendment to its claim showing such amount.

The opinion of the district court is reported in 100 F. Supp. 489, and recites in part that:

"The National Labor Relations Board has petitioned for review of the order of Referee in Bank-

ruptcy Smart, which disallowed the Board's claim. These are the facts—

"On January 3, 1947 the Board issued a complaint against the present bankrupt and another alleging that they had engaged in unfair labor practices in violation of the National Labor Relations Act. After appropriate proceedings, the Board on February 4, 1948 ordered the bankrupt to pay certain persons back pay from the date of discrimination found by the Board to the date of an offer of reinstatement. June 7, 1948 an involuntary petition in bankruptcy was filed against the bankrupt. December 7, 1948 the Court of Appeals of this Circuit entered its decree enforcing the Board's order. March 15, 1949 the Board filed with the Referee its proof of claim for the back pay of the persons covered by the Court's decree. The Referee held a hearing on April 17, 1950 at which he entertained an amendment to the claim and took evidence. June 29, 1950 the Referee disallowed the claim. His reasons, given in his December 1, 1950 certificate to this Court, were that the persons covered by the back pay order were not employees of the bankrupt; that the claims of those persons had, in any event, been compromised by them and the bankrupt; and that the claims were not liquidated."

[fol. 147] The trustee's statement of points is as follows:

"1. The Court erred in ruling that a Referee in Bankruptcy has no authority at any stage to rule upon matters involving the question whether a person is an employer under the National Labor Relations Act and the extent to which an employer is obligated to make restitution.

"2. The Court erred in finding that the order of the National Labor Relations Board of February 4, 1948 was a final administrative determination that the future bankrupt was liable to make compensation according to a declared formula.

"3. The Court erred in not ruling that the claim of the National Labor Relations Board was unliquidated.

"4. The Court erred in not ruling that an unliquidated claim shall not be allowed unless liquidated or

the amount thereof estimated in the manner and within the time directed by the Bankruptcy Court.

"5. The Court erred in not ruling that the back pay order had been fully complied with.

"6. The Court erred in ruling that the claim filed by the National Labor Relations Board is entitled to priority as a debt owing to the United States under Sec. 64(a)(5) of the Bankruptcy Act."

We believe that the district court was right in ruling that the Board "* * * is the exclusive agency, subject to review by appellate courts of the United States, for determining whether under the National Labor Relations Act, a person is an 'employer' of another and obligated to make restitution to that other. § 10(a) of the National Labor Re-
[fol. 148] lations Act, as amended. *Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 * * *".

The decree of this court on December 7, 1948 affirmed and enforced the Board's order of February 4, 1948. The Board's order, among other things, required the respondents in the enforcement proceedings, Hill Transportation Company and MacKenzie Coach Lines, Inc., to take affirmative action in making whole in the manner set forth in "the remedy" certain persons whose names appeared in an appendix to the order "for any loss they may have suffered by reason of the respondents' discrimination against them." In *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298, this court said:

"If, after the entry of an enforcement decree imposing an obligation expressed in terms of a general formula, a bona fide dispute should arise as to the precise obligation of the respondent when the formula comes to be applied to a particular set of facts, there would in such a case be no danger that the respondent would be adjudged in criminal contempt until, after appropriate procedure, the respondent's obligation is determined with the requisite precision and ultimately embodied in a supplemental decree of the enforcement court. * * *".

In a footnote to the opinion in *National Labor Relations Board* v. *Bird Mach. Co.*, 174 F. 2d 404, this court noted the possibility of a supplemental order which would require a petition to this court for enforcement. It is then that the question of the precise amount and extent of the obligation can be passed upon by this court.

Therefore, without laboring the point further, as to the extent of the bankrupt's liability at this time, we pass to the other questions presented.

We are satisfied that the district court was correct in [fol. 149] ruling that the Board's order is a judgment under § 63 (a)(1) of the Bankruptcy Act with the reservation however, as indicated above, that it is merely interlocutory as to the extent of the obligation on the back pay issue. See *Haynes Stellite Co.* v. *Chesterfield*, 97 F. 2d 985; *Bird Mach. Co.* case, *supra*.

The questions remaining now are: (1) can the bankruptcy court liquidate such a claim, and (2) what priority is such a claim entitled to, if any.

In its brief the Board states "* * * The Bankruptcy Act vested in the Bankruptcy Court the power to disallow claims where the claimant has unduly delayed effecting the liquidation of his claims. Accordingly we acknowledge that should the Board unduly delay in commencing back pay proceedings, this might warrant a court in holding that Section 57(d) of the Bankruptcy Act should prevail. * * *" That section provides in part for the allowance of unliquidated claims within the time directed by the court and the disallowance of such a claim if it is not capable of liquidation or that liquidation would unduly delay the administration of the estate. The Board argues quite persuasively that it is not guilty of laches in not yet having liquidated its claim in view of the trustee's position that the beneficiaries of the back pay order were not employees of the bankrupt and because of the important legal question as to what agency (Bankruptcy Court or the Board) should liquidate the claim. The determination by the district court appears to us to be reasonable in allowing the Board 2 months to fix the amount of the liability. This ruling has not been demonstrated to us to be inconsistent with the Bankruptcy Act. Rather the ruling appears to give effect

to the intent of the National Labor Relations Act. The Supreme Court said in *I. A. of M.* v. *Labor Board*, 311 U.S. 72, 82, reh. den. 311 U.S. 729: "* * * It is for the Board, [fol. 150] not the courts, to determine how the effect of prior unfair labor practices may be expunged. * * *" The determination of the amount of back pay is an integral part of the Board's jurisdiction. It is within its particular competence and knowledge to decide such questions in effectuating the purposes of the National Labor Relations Act, subject to review by this court. An example cited in the Board's brief is pertinent where it stated: "* * * the ascertainment of the amount of back pay due involves the determination of whether any of the employees have willfully incurred losses of earnings by unjustifiably refusing to take desirable new employment during the period following their discharge." Cf. *Harvest Queen Mill & Elevator Co.*, 90 NLRB 320.

It is not improper for the bankruptcy court to "stay its hand" for a reasonable time pending an administrative determination of a question such as we have here. See *Smith* v. *Hoboken R. Co.*, 328 U.S. 123. Cf. *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, reh. den. 309 U.S. 694.

The record is inconclusive on the question of whether or not the Board had approved a settlement of the back pay question. We agree, however, with the district court that there was no adequate showing that the Board approved any settlement agreement. See *Bird Mach. Co.* case, *supra*, and 29 C.F.R. 101.9.

We come now to the last question which concerns the priority of the Board's claim. The district court held that is was entitled to priority as a debt owing to the United States under § 64(a)(5) of the Bankruptcy Act. We concur in this view. See *National Labor Relations Bd.* v. *Carlisle Lumber Co.*, (9 Cir.), 108 F. 2d 188; *National Labor Relations Bd.* v. *Stackpole Carbon Co.*, (3 Cir.), 128 F. 2d 188. Cf. *Bramwell* v. *U. S. Fidelity Co.*, 269 U.S. 483.

In *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609, cert. den. 314 U.S. 696, the court held that a back pay [fol. 151] allowance under the provisions of the National Labor Relations Act is entitled to a § 64(a)(2) priority,

yet it contains language favorable to the Board's contention in this case. The court said at pp. 612, 614:

> "It was an obligation or indebtedness of a public character which the Board alone was authorized to enforce. * * * The Board was therefore a creditor under the Bankruptcy Act, * * *
>
> * * * * * * *
>
> "Under the position here taken, we deem it unnecessary to determine whether an award of back pay may, for any other purpose, be regarded as a debt due to the United States."

We do not regard the Board's claim here as a penalty. On this ground, the case of *Republic Steel Corp.* v. *Labor Bd.*, 311 U.S. 7, is clearly distinguishable. See *National Labor Relations Board* v. *Baltimore T. Co.*, (4 Cir.), 140 F. 2d 51, cert. den. 321 U.S. 795.

The inequity envisaged by the court in the *Killoren* case, supra, is not a factor in the circumstances here where there is no indication that there are any wage claimants whose claims would be prejudiced by the allowance of a § 64(a)(5) priority. The Board argues persuasively in its brief that even if equities are to be considered as between the two classes of workers (those who worked and those who were discriminatorily discharged) the latter should be favored. The brief states:

> "* * * And it is only because these employees relied upon the assurances of their Government that they could freely engage in union activity without fear of reprisal that they are now faced with the prospect that if priority under Section 64 (a) (5) is denied, then they must take their chances with the general creditors, which puts them in a much worse position than the [fol. 152] working employees who have received their wages in full. Thus the hypothetical inequity which may result from a refusal to apply the rule of the *Killoren* case, which, as we show below is not as rigid as appellant assumes, must be balanced against the inequitable deprivation to which the discharged employees are exposed in the absence of the fifth priority.

It is unrealistic to sacrifice the equities of these many for the sake of a few who, as in the hypothetical case assumed by the Court in the *Killoren* case, voluntarily risked working without wages for more than three months preceding the bankruptcy of their employer."

Since the obligation to take action in such claims runs to the Board, which is an agency of the United States, and because its proceeding in this fashion is consistent with its duty to effectuate the purposes of the National Labor Relations Act, we conclude that its claim is entitled to a §64(a)(5) priority under the Bankruptcy Act.

The order of the district court is affirmed.

[fol. 153] On the same day, February 11, 1952, the following judgment was entered:

JUDGMENT—February 11, 1952

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by appellant, pro se, and by counsel for appellee.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

Thereafter, to wit, on February 19, 1952, mandate was stayed until further order of Court.

[fol. 154] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 155] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 677

LOUIS K. NATHANSON, TRUSTEE, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI—Filed June 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.